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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

SYLVIA L. MENDENHALL

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Reasons for granting the petition	11
Conclusion	23
Appendix A	1a
Appendix B	8a
Appendix C	9a

CITATIONS

Cases:

<i>Adams v. Williams</i> , 407 U.S. 143.....	14, 15, 16
<i>Beck v. Ohio</i> , 379 U.S. 89	16
<i>Bretti v. Wainwright</i> , 439 F.2d 1042, cert. denied, 404 U.S. 943	23
<i>Coates v. United States</i> , 413 F.2d 371.....	21
<i>Delaware v. Prouse</i> , No. 77-1571 (March 27, 1979)	14
<i>Holland v. United States</i> , 348 U.S. 121....	15
<i>Lowe v. United States</i> , 407 F.2d 1391.....	21
<i>Schneckloth v. Bustamonte</i> , 412 U.S. 218..	23
<i>Scott v. United States</i> , 436 U.S. 128	21
<i>Terry v. Ohio</i> , 392 U.S. 1	7, 14, 19
<i>United States v. Ballard</i> , 573 F.2d 913..3,	17, 18
<i>United States v. Bazinet</i> , 462 F.2d 982, cert. denied, 409 U.S. 1010	9-10
<i>United States v. Brignoni-Ponce</i> , 422 U.S. 873	7, 14, 18

II

Cases—Continued

Page

<i>United States v. Brunson</i> , 549 F.2d 348, cert. denied, 434 U.S. 842	19
<i>United States v. Chatman</i> , 573 F.2d 565..	3, 20
<i>United States v. Cortez</i> , No. 77-1987 (9th Cir. April 19, 1979)	18
<i>United States v. Cyzewski</i> , 484 F.2d 509, cert. dismissed, 415 U.S. 902	18
<i>United States v. Doran</i> , 482 F.2d 929.....	18
<i>United States v. Edwards</i> , 498 F.2d 496..	18
<i>United States v. Elmore</i> , No. 78-5304 (5th Cir. May 22, 1979)	3, 19
<i>United States v. Fike</i> , 449 F.2d 191	23
<i>United States v. Gibson</i> , 392 F.2d 373.....	20
<i>United States v. Grandi</i> , 424 F.2d 399, cert. denied, 409 U.S. 870	21
<i>United States v. McCaleb</i> , 552 F.2d 717....	3, 8, 9, 12, 13, 15, 20
<i>United States v. Oates</i> , 560 F.2d 45..	3, 18, 20, 21
<i>United States v. Palazzo</i> , 488 F.2d 942....	18
<i>United States v. Pope</i> , 561 F.2d 663.....	3
<i>United States v. Price</i> , No. 78-1386 (2d Cir. May 18, 1979)	3, 15, 18
<i>United States v. Rico</i> , 594 F.2d 320.....	3
<i>United States v. Richards</i> , 500 F.2d 1025, cert. denied, 420 U.S. 924	20
<i>United States v. Salter</i> , 521 F.2d 1326....	20
<i>United States v. Short</i> , 570 F.2d 1051.....	20
<i>United States v. Troutman</i> , 590 F.2d 604	3, 23
<i>United States v. Van Lewis</i> , 409 F. Supp. 535, aff'd, 556 F.2d 385	3, 11, 17
<i>United States v. Watson</i> , 423 U.S. 411....	23
<i>United States v. Wylie</i> , 569 F.2d 62, cert. denied, 435 U.S. 944	19, 20, 21

III

Constitution and statute:	Page
United States Constitution,	
Fourth Amendment	2, 7, 19
21 U.S.C. 841 (a) (1)	4

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App. A, *infra*, 1a-7a) is not yet reported. The opinion of the panel (App. B, *infra*, 8a) and the opinion of the district court (App. C, *infra*, 9a-20a) are not reported.

JURISDICTION

The judgment of the en banc court of appeals was entered on April 6, 1979. On April 27, 1979, Mr.

Justice Stewart extended the time within which to file a petition for a writ of certiorari to June 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether federal narcotics agents who approach a person and ask for identification on the basis of facts that in their experience indicate that the person may be a narcotics courier violate the Fourth Amendment whenever the observed facts can be said to be consistent with innocent behavior.

2. Whether federal narcotics agents, in requesting a suspected narcotics courier to move from the public areas of an airline terminal to a nearby office for further questioning, have effected an arrest that is unconstitutional unless supported by probable cause.

3. Whether a suspect who is being illegally detained can validly consent to a search.

STATEMENT

1. Since October 1974, the Drug Enforcement Administration has operated an extensive airport surveillance program designed to intercept couriers transporting narcotics between major drug origination and distribution centers in the United States. The program was primarily initiated and developed by DEA agents at the Metropolitan Detroit Airport, a major drug distribution center, and now operates at more than 20 airports throughout the nation. The program has resulted in the interdiction of substantial quantities of illicit drugs and has also generated

a corresponding abundance of litigation in the lower federal courts.¹ Under the program, trained and experienced agents observe arriving and departing passengers on certain flights for characteristics and behavioral traits which, on the basis of their collective experience, have tended to distinguish drug couriers from other passengers.² The DEA and its agents in the field have also developed relatively standard procedures for approaching and questioning individuals suspected of being drug couriers. This case rep-

¹ For statistics relating to the success of the program in interdicting narcotics and narcotics couriers, see App. A, *infra*, 4a n.1; *United States v. Van Lewis*, 409 F. Supp. 535 (E.D. Mich. 1976), *aff'd*, 556 F. 2d 385 (6th Cir. 1977). See also discussion, *infra*, page 11 n.13.

For some of the recent cases considering suppression motions arising out of the operation of the program see *United States v. Price*, No. 78-1386 (2d Cir. May 18, 1979); *United States v. Rico*, 594 F. 2d 320 (2d Cir. 1979); *United States v. Oates*, 560 F. 2d 45 (2d Cir. 1977); *United States v. Elmore*, No. 78-5304 (5th Cir. May 22, 1979); *United States v. Troutman*, 590 F. 2d 604 (5th Cir. 1979); *United States v. Ballard*, 573 F. 2d 913 (5th Cir. 1978); *United States v. Pope*, 561 F. 2d 663 (6th Cir. 1977); *United States v. McCaleb*, 552 F. 2d 717 (6th Cir. 1977); *United States v. Chatman*, 573 F. 2d 565 (9th Cir. 1977).

² These traits and characteristics, sometimes referred to as a "drug courier profile," include such elements as round trips of short duration between major drug centers, purchasing tickets with cash (and particularly small bills), no baggage except carry-on-items, deplaning last, and, in general, nervous or unusual behavior. See *United States v. Van Lewis*, *supra*, 409 F. Supp. at 538. These guidelines, their development, and the way in which they are used are more fully described at page 17 n.17, *infra*.

resents a fairly typical example of the operation of the airport surveillance program and of the legal questions that it has generated.

2. Following a non-jury trial on stipulated facts in the United States District Court for the Eastern District of Michigan, respondent was convicted of possession of heroin with intent to distribute it in violation of 21 U.S.C. 841 (a) (1).³

The evidence at a pretrial suppression hearing showed that early on the morning of February 10, 1976, two DEA agents stationed at the Detroit Metropolitan Airport were observing passengers deplaning from an American Airlines flight from Los Angeles. Los Angeles was known to the agents as a major source of narcotics (Tr. 10-11, 20). Agent Anderson's attention was drawn to respondent, who was the last person to leave the airplane. In his experience, which included participation in more than 100 arrests during his assignment to the Detroit Airport (Tr. 9; App. C, *infra*, 13a-14a), drug couriers tend to deplane last, particularly on early morning flights, so that they can more easily detect agents who might be watching them (Tr. 12).

Anderson testified that respondent "completely scanned the whole area where we were standing" and "appeared to be very nervous" as she came off the airplane (Tr. 11, 20). Respondent proceeded past the baggage claim area but claimed no luggage—a

³ Respondent was sentenced to a term of 18 months' imprisonment, to be followed by a three-year special parole term.

fact which the agents had found to be another common characteristic of drug couriers (Tr. 10, 12). Respondent instead went to the Eastern Airlines ticket counter (Tr. 13). Agent Anderson stood in line directly behind her at the counter and watched as she took from her purse an American Airline ticket marked for travel from Los Angeles through Detroit to Pittsburgh (Tr. 12-13). Respondent sought to change her ticket from American to Eastern, but kept Pittsburgh as her destination (Tr. 13); this was significant to the agent because couriers frequently change airlines to evade surveillance and detection (Tr. 13-14).

Respondent then left the ticket counter and headed for the Eastern flight departure gate (Tr. 14). The agents approached her on the concourse, identified themselves as federal agents, and asked to see her identification and airline ticket (Tr. 14). Respondent produced her driver's license, which was in the name of Sylvia Mendenhall. Her ticket, however, was issued in the name of "Annette Ford." When asked why the ticket was under a different name, respondent stated that she "just felt like using that name" (Tr. 14). The agents' suspicions were heightened when respondent stated that she had remained in California only two days, which seemed an unusually brief period for a journey of that distance (Tr. 10, 14-15). Agent Anderson then specifically identified himself as a federal narcotics officer, and respondent "became quite shaken, extremely nervous.

She had a hard time speaking" (Tr. 15).⁴ Agent Anderson then asked respondent if she would accompany him to the DEA office (which was located less than 50 feet away) for further questioning, and she agreed (Tr. 15, 26). At the office, the agent asked her if she would mind allowing a search of her person and handbag and told her that she had the right to decline the search if she so desired. She responded, "Go ahead" (Tr. 16). She then handed Agent Anderson her purse, which contained a different airline ticket, which had been issued to "F. Bush" three days earlier for a flight from Pittsburgh through Chicago to Los Angeles (Tr. 16). Respondent admitted that this was the ticket on which she had flown to California but gave no reason for using that additional alias (Tr. 16).

A female police officer then arrived to search respondent's person (Tr. 16-17). She asked the agents if respondent had consented to be searched (Tr. 34). The agents said that she had, and respondent followed the policewoman into a private room. There the policewoman again asked respondent if she had consented to the search, and respondent replied that she had (Tr. 34). The policewoman explained that the search would require the removal of respondent's clothing. As respondent removed her clothing, she took a plastic package from her bra, which appeared to contain heroin, and another package, wrapped in

⁴ The entire conversation in the concourse lasted only two or three minutes (Tr. 15).

brown paper, from her underpants, and handed both to the policewoman (Tr. 34-35).⁵ The agents then arrested respondent for possessing heroin (Tr. 17).

3. The district court denied respondent's motion to suppress the heroin found on her person (App. C, *infra*, 9a-20a). The court concluded that the agents' action in initially approaching respondent and asking to see her ticket and identification was a permissible investigative stop under the standards of *Terry v. Ohio*, 392 U.S. 1 (1968), and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), because it was based on specific and articulable facts that, in light of the agents' substantial experience,⁶ justified a reasonable suspicion of criminal activity and warranted the limited intrusion involved (App. C, *infra*, 13a-16a). The court also found that respondent was not placed under arrest by having been asked to accompany the agents to the DEA's office, that she had done so voluntarily and in a spirit of apparent cooperation, and that she was not arrested until after she had been searched (*id.* at 16a). Finally, the court, specifically crediting Agent Anderson's testimony, found that respondent "gave her consent to the search [in the

⁵ The search took five to ten minutes (Tr. 17).

⁶ The court noted (App. C, *infra*, 13a-14a) that Agent Anderson "has had ten years' experience as a federal narcotics agent; that he has attended several training sessions and seminars to prepare him for his duties; that he has been assigned to the airport detail for more than a year and, in the last year alone, has made approximately 100 arrests at the airport."

DEA office] and * * * such consent was freely and voluntarily given" (*ibid.*).⁷

4. A panel of the court of appeals reversed in a judgment order, stating only that "the court concludes that this case is indistinguishable from *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977)" (App. B, *infra*, 8a).

In *McCaleb*, the court suppressed heroin seized by DEA agents at the Detroit Airport in substantially similar circumstances.⁸ The court rejected the gov-

⁷ The court also concluded that, although respondent was not arrested until after she had been searched and the heroin discovered, the agents had probable cause to arrest her before the search. The court outlined all of the facts known to the agents at that time, including the fact respondent had been travelling under two different aliases, and concluded (App. C, *infra*, 18a): "Although each of these facts, in and of themselves, are relatively innocuous and innocent, when all of them are found to coincide, and all of them are known characteristics of airborne drug couriers, they furnish the officer observing them with probable cause. To hold otherwise would be to direct DEA Agents to forget all of their training and experience, to ignore the obvious, and to not use all of the education and investigative know-how which they are required to acquire and cultivate in order to obtain and keep their jobs."

⁸ There are a number of differences between the facts in *McCaleb* and the instant case: for example, *McCaleb* involved three suspects travelling together; one of them claimed one suitcase from the luggage claim, and the agent, in asking consent to search the bag and advising them of their right to refuse, also advised them that if consent were refused, he would detain them while he sought a search warrant (552 F.2d at 719). But the salient facts of the two cases are substantially similar—for example, round trips of short duration to Los Angeles, carry-on luggage only, nervous behavior, use

ernment's reliance on the agents' experience and the "drug courier profile" (see note 2, *supra*), holding that the circumstances did not give rise to a reasonable and articulable suspicion justifying the initial approach and request for identification for the reason that "[t]he activities of the appellants in this case observed by DEA agents, were consistent with innocent behavior." 552 F.2d at 720.

The court in *McCaleb* further concluded that even if the initial approach had been permissible, asking the suspects to accompany the agents to a private room for further questioning constituted an arrest requiring probable cause because at that point "appellants * * * were not free to leave [and thus] the arrest was clearly complete." *Ibid.*⁹ Finally, the court in *McCaleb* concluded that the consent to search in that case was not voluntary, primarily because of what the court believed to be the unconstitutional nature of the preceding stop and detention. *Id.* at 720-721.¹⁰

of aliases, and consents to search—and they present the same general questions of law.

⁹ The opinion does not indicate the basis of the court's conclusion that the suspects were not free to leave; it may have been based on the testimony of one of the agents at the suppression hearing that if the suspects had sought to leave, he would have restrained them. Whether the agent's subjective and uncommunicated intent on that matter has any relevance to the legal questions involved is discussed *infra*, page 21.

¹⁰ The court relied for this conclusion on *United States v. Bazinet*, 462 F. 2d 982, 989 (8th Cir.), cert. denied, 409

The case was reheard by the court en banc, which reinstated the panel decision, stating simply that the majority was convinced that in this case there was not "valid consent to search within the meaning of [*McCaleb*]" (App. A, *infra*, 2a). The court also stated that it should "not * * * attempt to formulate definitive rules. Despite some general similarities, every single case differs from every other in material degree" (*ibid.*).

Judge Weick dissented. He noted that the majority had declined to decide any of the "questions of exceptional importance to be considered in connection with investigations by experienced federal agents of traffic in huge quantities of narcotics flowing into the Detroit airport * * *" (App. A, *infra*, 4a). To the extent the majority relied on principles stated in *McCaleb*, Judge Weick concluded that "it is time to overrule *McCaleb* and its progeny" (*id.* at 6a).¹¹

U.S. 1010 (1972), in which the court stated that "the mere fact that a person has been arrested in violation of his constitutional rights casts grave doubts upon the voluntariness of a subsequent consent. The government has a heavy burden of proof in establishing that the consent was the voluntary act of the arrestee and that it was not the fruit of the illegal arrest" (footnote omitted).

¹¹ The instant case was considered by the en banc court jointly with *United States v. Camacho*, No. 78-5081. That case presented many of the same issues as this one and was disposed of by the court of appeals in the same manner. We are not seeking review of the decision in *Camacho* because of the presence of certain additional factual circumstances that cast doubt upon the voluntariness of the consent to search in that case.

REASONS FOR GRANTING THE PETITION

This case presents questions of exceptional importance to a major and highly successful law enforcement program.¹² As noted in the Statement (page 2, *supra*), the DEA's airport surveillance program now operates in more than 20 cities. Its success in interdicting the flow of narcotics is documented not only in Judge Weick's dissent (App. A, *infra*, 4a n.1) but also by the numerous reported decisions considering suppression claims arising out of its operation (see note 1, *supra*).¹³ By seeking to intercept

¹² We believe that the questions we present are also of general importance to the conduct of police investigations in a wide variety of contexts. We focus here upon their special importance to the airport surveillance program because that is the context in which the court of appeals decided them and because it is not certain to what extent the standards articulated in *McCaleb* would be applied by that court in other contexts.

¹³ The operation and success of the Detroit airport program is most fully described in the opinion of the district court in *United States v. Van Lewis*, 409 F. Supp. 535 (E.D. Mich. 1976), *aff'd*, 556 F. 2d 385 (6th Cir. 1977), issued following an extensive suppression hearing. The court described the background and operation of the program and the development and use of the profile. It also found (409 F. Supp. at 539) that since the initiation of the program, "agents have searched 141 persons in 96 airport encounters [*i.e.*, encounters where a search ensues] prompted by their use of the courier profile and independent police work. * * * Agents found controlled substances in 77 of the 96 encounters and arrested 122 persons for violations of the narcotics laws." Further data demonstrating the high success rate of the program and the reliability of the courier profile was developed in the suppres-

the movement of substantial quantities of illicit drugs from the importers to their customers, the retail distributors, the basic method and objective of the program is a significant departure from and complement to more traditional methods of narcotics law enforcement, such as searches and seizure at the point of importation or operations directed at the detection of retail (or "street") sales by means of informants and undercover purchases.

The operation of the airport surveillance program typically involves—as it did in this case—three principal and recurring features: (1) the initial contact with the suspect for questioning and identification, based in large part on characteristics and patterns of behavior that the agents, through their collective experience, have learned to associate with drug couriers; (2) a request that the suspect move from the public areas of the terminal to a nearby office if the agents believe that further questioning is appropriate; and (3) a request in the office for a consent to search the suspect's effects or person. The legal standards established by the Sixth Circuit in *United States v. McCaleb*, 552 F.2d 717 (1977), and relied on by the en banc court in this case, if correct, mean that the relatively standard practices developed and

sion hearing in *United States v. Camacho* and presented to the court of appeals in our petition for rehearing in this case and *Camacho* (C.A. App. in No. 78-5081 at 44-46). Some of those statistics are set forth in Judge Weick's dissent, App. A, *infra*, 4a n.1.

followed by DEA in each of these three phases of the airport surveillance program, which are believed to contribute significantly to its successful operation, are unconstitutional.

As we explain more fully below, the legal standards set forth in *McCaleb* are in direct conflict with the decisions of other circuits and with general Fourth Amendment principles delineated by this Court. Even if we are wrong on the merits, however, the issues are important and recurring; they warrant this Court's plenary review in order to provide needed guidance to law enforcement agencies like DEA in the structuring of their programs and in the training and supervision of their agents.

Corresponding to the three principal features of the airport surveillance program, the decision below and in *McCaleb* present three distinct legal questions: (1) whether law enforcement officers may, on the basis of observation of articulable facts that in their experience suggest criminal activity but that are "consistent with innocent behavior" (*McCaleb, supra*, 552 F.2d at 720), approach an individual in a public place to ask questions and request production of identification; (2) whether requesting a suspect to go to a nearby office for further questioning converts a permissible investigative stop into an arrest that is invalid unless supported by probable cause; and (3) whether an unlawful stop or arrest normally precludes a valid consent to search, even when the suspect has been advised of the right to refuse con-

sent. We submit that the court below decided each of those questions incorrectly.

1. In *Terry v. Ohio*, 392 U.S. 1 (1968), and subsequent cases, this Court has established that police officers may briefly detain a person for investigative purposes if they can point to specific facts that are reasonably indicative of possible criminal activity but that do not amount to probable cause—i.e., facts that support a reasonable suspicion, but not necessarily a reasonable conclusion, of criminality. See *Terry, supra*, 392 U.S. at 20-27; *Adams v. Williams*, 407 U.S. 143, 146-149 (1972); *United States v. Brignoni-Ponce*, 422 U.S. 873, 880-882 (1975). The proper consideration, as the Court stated in *Terry*, is whether an officer is “able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion” (392 U.S. at 21; footnote omitted). The lawfulness of the detention thus depends on considerations both of the facts supporting the suspicion and of the degree and purposes of the intrusion. See also *Delaware v. Prouse*, No. 77-1571 (March 27, 1979), slip op. 5.

Contrary to the implication of the court of appeals’ opinion (App. A, *infra*, 2a), this case involves more than simply the application of settled legal principles to the varying facts of particular cases. Rather, the court’s holding here and in *McCaleb* with regard to the lawfulness of the initial encounter turn upon several general propositions that have the effect

of severely curtailing, in a large class of cases, the investigative activities of law enforcement officers.

a. In *McCaleb* (and presumably in this case), the court of appeals found no reasonable suspicion warranting the initial approach to the suspects, relying on the ground that their observed behavior could be said to be "consistent with innocent behavior." 552 F.2d at 720. The proposition of law indicated by that holding is, we submit, plainly incorrect; it finds no support in *Terry* or, to our knowledge, any other case, and it has been expressly rejected by the Second Circuit. *United States v. Price*, No. 78-1386 (May 18, 1979), slip op. 2671. Virtually *any* set of facts can be said to be consistent with some hypothesis of innocent behavior, even if the facts would indicate an extremely high likelihood of criminal activity to a person of reasonable caution. Not even the reasonable doubt standard imposes such a stringent criterion on the fact-finder,¹⁴ to say nothing of the progressively more relaxed standards of probable cause and reasonable suspicion. Certainly the facts warranting reasonable suspicion and justifying the intrusions in *Terry* and in *Adams v. Williams*, 407 U.S. 143 (1972), could be said to have been consistent with an hypothesis of innocent behavior. See *Terry v. Ohio*, *supra*, 392 U.S. at 22.

It is difficult to imagine that the Sixth Circuit in this case and in *McCaleb* understood *Terry* to re-

¹⁴ See *Holland v. United States*, 348 U.S. 121, 139-140 (1954).

quire virtual certainty of criminality before an investigative stop is warranted. If not, however, it is impossible to deduce what else the “consistent with innocent behavior” standard does mean, particularly in view of the court’s unwillingness to amend or clarify that standard in *McCaleb* and in this case.¹⁵ In the absence of this Court’s review, agents and district courts in the Sixth Circuit will lack any meaningful guidance with respect to the lawfulness of particular actions performed in the course of the surveillance program.

b. It is almost as difficult to deduce the court of appeals’ view of the relevance in these cases of the set of common drug courier characteristics that the agents have collectively developed in their extensive experience—referred to popularly and by the court as the “drug courier profile.” The court seems to regard reliance by the agents on these characteristics in initiating an encounter as largely irrelevant and possibly improper.¹⁶ If so, we can see no rational

¹⁵ It is possible that the court meant to say that reasonable suspicion cannot exist if the observed behavior is more consistent with innocence than it is with criminality. If so, it would be incorrect, because that would define “reasonable suspicion” in terms of the standard for probable cause. See, e.g., *Adams v. Williams*, *supra*, 407 U.S. at 148; *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

¹⁶ In both *McCaleb* (552 F. 2d at 720) and the en banc decision in this case, the court stated that “the so-called drug courier profile does not, in itself, represent a legal standard of probable cause in this Circuit” (App. A, *infra*, 2a). In *McCaleb* the court went on to state that “while a set of facts may arise in which the existence of certain profile characteristics constitutes reasonable suspicion, the circumstances of this case do not * * *.” 552 F. 2d at 720. See also App. A,

basis for that view. In deciding whether to detain a person for questioning it seems to us plainly appropriate—indeed commendable—for an agent to rely not only on his own experience but also on the collective experience of his colleagues and predecessors.¹⁷

infra, 2a. What is meant is not clear, but in finding no reasonable suspicion in both cases—despite a substantial correspondence of observed traits with profile characteristics—the court appears to have concluded that such coincidence is largely irrelevant and should be disregarded. See also *United States v. Van Lewis*, 556 F. 2d 385, 389 (6th Cir. 1977) (“the profile is too amorphous to be integrated into a legal standard”); *United States v. Ballard*, 573 F. 2d 913, 916 (5th Cir. 1978) (coincidence with the profile, without more, cannot justify an investigative stop).

We believe that view is incorrect. It is true that the reasonableness of each stop must be measured by the totality of the observed facts and that the coincidence of those facts with profile characteristics does not necessarily make the stop reasonable (*e.g.*, if other facts negate the reasonableness of the inferences)—and we have never suggested otherwise. But it is equally true that a high coincidence between observed facts and profile characteristics does not necessarily make the stop unreasonable or justify disregarding that coincidence, which is what the Fifth and Sixth Circuits have apparently suggested.

¹⁷ As the district court indicated (App. C, *infra*, 18a), the value of collective experience is the very premise of education and training.

While, as we have noted (note 16, *supra*) the court of appeals’ view of the profile is unclear, it is possible that the court misunderstood the nature and function of the profile, the development and use of which is described in *United States v. Van Lewis*, *supra*, 409 F. Supp. at 538-539. As a factual matter, there is no national profile; each airport unit has developed its own set of drug courier characteristics on the basis of that unit’s experience. While many of the salient characteristics are common to the guidelines of

See, e.g., *United States v. Brignoni-Ponce*, *supra*, 422 U.S. at 884-885, where the Court clearly indicated that the collective experience of Border Patrol officers would be highly relevant to the reasonableness of particular vehicle stops. See also *United States v. Price*, *supra*, slip op. 2666-2670; *United States v. Oates*, 560 F.2d 45, 61 (2d Cir. 1977); but cf. *United States v. Ballard*, 573 F.2d 913, 915-916 (5th Cir. 1978); *United States v. Cortez*, No. 77-1987 (9th Cir. April 19, 1979). The decision below and in *McCaleb* raises substantial questions about the utility, if not the propriety, of this important law enforcement device, and the need to resolve those questions is a further reason why this Court's review is appropriate.

c. The analysis of the court of appeals also appears to ignore entirely the question whether the amount of suspicion necessary to justify a particular police-citizen encounter varies with the intrusiveness

most, if not all units, there are some differences based on the particular experiences of different units and the peculiar characteristics of each airport. Furthermore, the profile is not rigid, but is constantly modified in light of experience.

The basic purpose of the profile is to inform, but not to serve as a substitute for, the agents' judgment in particular circumstances. Similar profiles have been developed to assist in the detection of potential air pirates, or "skyjackers", and their use has been widely noted and approved. See *United States v. Edwards*, 498 F. 2d 496 (2d Cir. 1974); *United States v. Palazzo*, 488 F. 2d 942 (5th Cir. 1974); *United States v. Cyzewski*, 484 F. 2d 509 (5th Cir. 1973), cert. dismissed, 415 U.S. 902 (1974); *United States v. Doran*, 482 F. 2d 929 (9th Cir. 1973).

of the encounter. It is arguable that the initial encounter between the DEA agents and respondent in this case was not even a "seizure" of her person within the meaning of the Fourth Amendment.¹⁸ But assuming that it was, it surely must rank among the least intrusive of the range of such encounters that would require Fourth Amendment scrutiny. Accordingly, in our view, relatively little in the way of reasonable suspicion should be required to sustain the validity of the agents' limited action.

By its failure to accord proper weight to this consideration, as well as by its adoption of unduly onerous standards for determining what constitutes reasonable suspicion, the court of appeals has severely impaired the effectiveness of the critical first step in an important law enforcement program that has heretofore made significant strides in interdicting the distribution of narcotics.

¹⁸ In *Terry v. Ohio*, *supra*, 392 U.S. at 19 n.16, this Court stated: "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." At least one circuit has concluded, specifically in the airport surveillance context, that the initial encounter and request for identification does not constitute a seizure. See *United States v. Elmore*, No. 78-5304 (5th Cir. May 22, 1979). See also *United States v. Price*, *supra* (noting but reserving the question). Other courts have reached the same conclusion in similar contexts. See *United States v. Wylie*, 569 F. 2d 62, 68 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978); *United States v. Brunson*, 549 F. 2d 348, 357 (5th Cir.), cert. denied, 434 U.S. 842 (1977) (collecting cases).

2. The court in *McCaleb* concluded that even if an initial stop meets *Terry* standards, the agents' request that the suspect accompany them to a nearby private room converts the stop into an arrest requiring probable cause, because at that point the suspects "are not free to leave * * *." 552 F.2d at 720.

That conclusion, which is also of critical importance to the success of the airport surveillance program, is in conflict with decisions of the Ninth and Second Circuits, which have considered the issue specifically in this context. *United States v. Chatman*, 573 F.2d 565, 567 (9th Cir. 1977); *United States v. Oates*, *supra*.¹⁹

The Sixth Circuit's holding on this point is incorrect in several respects. First, whether or not a detained individual is free to leave manifestly cannot be the test for distinguishing a *Terry* stop from an arrest (or detention)²⁰ requiring probable cause,

¹⁹ See also *United States v. Salter*, 521 F. 2d 1326, 1328-1329 (2d Cir. 1975); *United States v. Richards*, 500 F. 2d 1025, 1027-1029 (9th Cir. 1974), cert. denied, 420 U.S. 924 (1975). Other circuits have reached the same conclusion in similar contexts. See *United States v. Short*, 570 F.2d 1051, 1054 (D.C. Cir. 1978); *United States v. Wylie*, 569 F. 2d 62, 70 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978); *United States v. Gibson*, 392 F. 2d 373, 376 (4th Cir. 1968).

²⁰ The term "arrest" has been used in a number of different ways. Usually it refers to the formal act by which a person is charged with an offense and taken into custody for that offense. It is often used, however, to refer to that degree of detention that goes beyond a *Terry* stop and that requires probable cause, although that may not entail a formal charge against the detainee or the element of extended deprivation of liberty.

since the kind of investigative stop authorized by *Terry* and other cases also presumes some restraint on liberty amounting to a "seizure" of the person. Second, to the extent the Sixth Circuit's view is based on the subjective but uncommunicated intent of the agents, it is incorrect because subjective intent is not the appropriate standard for determining Fourth Amendment violations, as *Terry* itself makes clear. 392 U.S. at 21-22. See also *Scott v. United States*, 436 U.S. 128, 136-137 (1978).²¹ Third, there is in our view no sound basis for concluding that removing a suspect from the public areas of a terminal to a nearby office for further brief questioning is automatically an unreasonable incident to a stop under the rationale of *Terry*.²² Finally, there is no basis in this record for overturning the district court's finding that respondent was not directed to the DEA office, but simply asked if she would go there, and that she willingly complied in a spirit of apparent cooperation. In any event, DEA agents need guid-

²¹ See also *United States v. Oates*, *supra*, 560 F. 2d at 58; *United States v. Wylie*, *supra*, 569 F. 2d at 69 n.7; *United States v. Grandi*, 424 F. 2d 399, 401 (2d Cir. 1970), cert. denied, 409 U.S. 870 (1972); *Coates v. United States*, 413 F. 2d 371 (D.C. Cir. 1969); *Lowe v. United States*, 407 F. 2d 1391, 1397 (9th Cir. 1969).

²² Moreover, the court of appeals gave no apparent consideration to the significant fact that respondent had shown the agents that she had been travelling under an alias before they asked her to accompany them to the DEA office—a fact that substantially increased their suspicion and indicated the appropriateness of further questioning.

ance on the validity of this aspect of the program as well, which the court below has declined to provide.²³

3. Finally, the decisions in this case and in *McCaleb* reflect the proposition that a consent to search normally cannot be valid if the preceding detention is impermissible. Since in this case it is difficult to imagine how respondent could have more clearly manifested her consent (having, as the district court found, willingly accompanied the agents to the office and then twice expressed consent to a search of her person and effects after being told of her right to refuse), it would seem to follow that the court of appeals believed that a valid consent can never be given when the preceding detention is for some reason impermissible. And because the court has effectively held unlawful DEA's standard procedures for investigative detention, the court's conclusion with respect to the consent issue provides agents with little, if any, means for the successful implementation of the program.

The Sixth Circuit's conclusion on the consent issue is, again, in conflict with the decision of at least one other circuit, which has upheld the validity of con-

²³ The validity of requiring a suspect to go to the police station for questioning is before this Court in *Dunaway v. New York*, No. 78-5066, argued March 21, 1979. If the State prevails in *Dunaway*, the propriety of the requiring a suspect to move a brief distance out of a crowded airport area to a nearby office would follow. But even if petitioner prevails in *Dunaway*, the substantially lesser intrusion involved in this case remains reasonable in our view.

sents in the course of airport detentions found or assumed to be impermissible. See *United States v. Troutman*, 590 F.2d 604 (5th Cir. 1979).²⁴ We believe that it is also in conflict with the standards set forth in *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973). See also *United States v. Watson*, 423 U.S. 411, 425 (1976) (Powell, J., concurring). This question also merits this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

RICHARD A. ALLEN
Assistant to the Solicitor General

JOHN LOFTUS
DEBORAH WATSON
Attorneys

JUNE 1979

²⁴ See also *United States v. Fike*, 449 F. 2d 191 (5th Cir. 1971), *Bretti v. Wainwright*, 439 F. 2d 1042 (5th Cir.), cert. denied, 404 U.S. 943 (1971), upholding consents in similar, non-airport contexts.



APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 78-5064, 78-5081

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

SYLVIA L. MENDENHALL and DAVID A. CAMACHO,
DEFENDANTS-APPELLANTS

Appeals from the United States District Court
for the Eastern District of Michigan,
Southern Division

Decided and Filed April 6, 1979

Before: EDWARDS, Chief Judge, WEICK, CELEBREZZE, LIVELY, ENGEL, and KEITH, Circuit Judges, sitting en banc.*

EDWARDS, Chief Judge and CELEBREZZE, LIVELY, ENGEL, and KEITH, Circuit Judges, joined in a Per Curiam Opinion. WEICK, Circuit Judge, (pp. 3-6) filed a separate dissenting opinion.

PER CURIAM. On petition filed by the United States, this court, on January 12, 1979, vacated the decisions in No. 78-5064, *United States v. Sylvia L. Mendenhall*, and No. 78-5081, *United States v. David A. Camacho*, and scheduled arguments on both before

* Judge Merritt recused himself from this hearing.

the court en banc. The cases have now been briefed and orally argued before the full court.

On careful review of the records, and the authorities cited to us in the Supreme Court and the Courts of Appeals, we now conclude that the panel decisions in both *Mendenhall* and *Camacho* should be and are hereby reinstated.

Our review of the facts in both of these cases convinces the majority of this court that in neither case was there valid consent to search within the meaning of *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977). We also hold that the so-called drug courier profile does not, in itself, represent a legal standard of probable cause in this Circuit. We recognize, of course, that the drug enforcement agency's employment of this profile in educating its officers as to what conduct to look for in relation to drug couriers is a perfectly valid law enforcement device.

Examination of these records and re-examination of precedent in these airport drug search cases in this and other Appellate Courts have led to our decision not to attempt to formulate definitive rules. Despite some general similarities, every single case differs from every other in material degree.

In view of our en banc decision set forth above, we now reverse our preceding denial of bail to *Mendenhall* and *Camacho* and remand these cases to the District Court for determination of an appropriate bond pending petitions for writ of certiorari.

WEICK, Circuit Judge, Dissenting. I respectfully dissent. En banc consideration of the present appeals

was ordered so that we could re-examine and reconsider our decision in *McCaleb*, which has been under continuous attack by the Government in an increasing number of narcotics cases coming from traffic in drugs at Detroit's Metropolitan Airport.

Important questions of law are involved in connection with investigations of drug traffic at the airport, such as the right of federal agents to stop and question suspects where such agents have reasonable grounds to believe that the suspects are engaged in narcotics transactions; and such questions as: Where the agents by their questions learn that the suspects are traveling under assumed names, and are acting in a suspicious manner, may they request that the suspects accompany them to a private room at the airport in order to comply with airport regulations designed to prevent confrontation in public areas and possible resulting injury to the public? and Where the suspects consent to accompany the officers to the private room, is such consent, or their consent in the private room to a search, coercive *per se*?

After receiving supplemental briefs filed by the parties and hearing oral arguments, the en banc majority, consisting of only five of the six Judges constituting the en banc Court (our normal complement is nine Judges and two more judgeships are provided in the recent Bill passed by Congress) summarily disposed of the appeals by a simple two-page per curiam order without deciding any of the important questions of law involved, which were the very reasons for granting en banc consideration.

It was suggested by a colleague that we withhold decision to await the determination by the Supreme Court of similar questions of law in pending "stop and frisk" cases, but such suggestion was not followed by the en banc majority. The similar cases in which the Supreme Court granted certiorari, heard oral arguments in one of them, and fixed the time for oral arguments in another, are as follows: *Delaware v. Prouse*, No. 77-1571 (heard January 17, 1979); *Michigan v. DeFillippo*, No. 77-1680, 47 U.S.L.W. 3053 scheduled during weeks of February 23 and 26 (one hour); *Brown v. Texas*, No. 77-6673.

The Government, in its petition for rehearing en banc, points out questions of exceptional importance to be considered in connection with investigations by experienced federal agents of traffic in huge quantities of narcotics flowing into the Detroit airport, principally from Los Angeles, San Diego, Miami, and New York.¹

¹ The amount and type of illegal narcotics seized at the Detroit Metropolitan Airport are as follows:

	1975	1976	1977	1978
Heroin	41.1 lbs.	66 lbs.	14.5 lbs.	10 lbs.
Cocaine	5.1 lbs.	7 lbs.	5.3 lbs.	4.8 lbs.
Phencyclidine	15 lbs.	5.5 lbs.	3 ozs.	1 lb.
Marijuana	794 lbs.	189.5 lbs.	347.8 lbs.	47.5 lbs.
LSD	6,000 dosage units		11,000 dosage units	
Hashish	5.8 ozs.		8 ozs.	
Amphetamines	41 grams			
Methamphetamines			29 ozs.	
Dangerous Drugs	93 grams		2,000 dosage units	1,536 dosage units

[p. 2, Petn for rehearing en banc]

The investigations involve persons who, in the trained mind of experienced federal agents, are regarded as suspicious. Usually such persons are traveling between distant places, without luggage or with little luggage, and are looking around and appear to be nervous. The agent will stop such a person in the airport, identify himself, ask the suspect for identification, and ask to see his plane ticket.

When identification has been made the agent usually discovers that the suspect is traveling under an assumed name. The plane ticket may also reveal stop-offs at a place or places other than Detroit. Sometimes the suspect is seen in the presence of a known narcotics dealer. The agent will then invite the suspect to accompany him to a private room in the airport. The reason is that the agent must comply with airport regulations which are designed to prevent public confrontation and injury which may result therefrom. When they arrive at the room the agent then asks the suspect for permission to search him. If consent is given, such consent ought not be vitiated by an appellate court where the District Court has found the consent to be voluntary, in the absence of a finding by the appellate court that the District Court's finding is not supported by substantial evidence. Where consent is not given, the agent would have the right to arrest and search, if he has probable cause to do so.

In the present appeals each District Judge hearing the case granted an evidentiary hearing on a motion to suppress evidence, and held that the federal agents

had reasonable grounds to stop and question the defendants, that defendants acquiesced in following the agents to the private room, and that consent to the search was either given voluntarily or that the agents had probable cause to arrest and search. The District Judges who presided in the present cases were the Honorables Ralph B. Guy, Jr. and Robert E. DeMascio, both able jurists with extensive experience in the trial of cases in the Eastern District of Michigan.

The en banc majority, relying on *McCaleb*, reverses the judgments of the District Judges without specifically finding that the District Judges' findings of fact on the issues of reasonable grounds to stop and question, acquiescence in following the agents to the private room, and probable cause to arrest and search or voluntary consent to the search, were not supported by substantial evidence, and are clearly erroneous, and that their conclusions of law are incorrect.

Apparently the en banc majority regard *McCaleb* as holding that the facts are *per se* coercive. If this is so, it is time to overrule *McCaleb* and its progeny. The *McCaleb* opinion also regards circumstances (which to the trained mind of the federal agents are regarded as suspicious), as such that they may be treated as innocent by an appellate court.

With the ever increasing traffic in narcotics causing so much damage and injury to the public, we ought not sanction a set of rules which hamstring the federal officers in making legitimate investigations. It is also noteworthy that the investigations

7a

in each of the present cases, as in many others, produced real results. The defendants were couriers of narcotics.

I would affirm the judgment of conviction in each appeal.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 78-5064

[Filed Oct. 20, 1978]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

SYLVIA MENDENHALL, DEFENDANT-APPELLANT

ORDER

BEFORE: WEICK, LIVELY and MERRITT, Circuit Judges.

Upon consideration of the briefs and oral arguments of counsel together with the record and transcript the court concludes that this case is indistinguishable from *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977).

Accordingly, the judgment of the district court is reversed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Criminal No. 6-80208

UNITED STATES OF AMERICA, PLAINTIFF

v.

SYLVIA L. MENDENHALL, DEFENDANT

MEMORANDUM AND ORDER

The Drug Enforcement Administration (DEA) has a continuing narcotic detection program whereby its agents observe flights arriving at Detroit Metropolitan Airport from cities around the country that are known to be primary source cities for contraband narcotics. On February 10, 1976, as a part of this program, DEA Agent Anderson was stationed so that he could observe passengers deplaning from American Airlines Flight 218 arriving from Los Angeles, California, a primary source city for Mexican heroin. He was assigned to detect possible couriers of illicit drugs. After stopping defendant, Agent Anderson accompanied her to the airport DEA office and conducted a search. As a consequence of his observation and actions on that day, defendant

was indicted for possession with intent to distribute approximately 250 grams of heroin in violation of 18 U.S.C. § 841(a)(1). Defendant has filed a motion to suppress the seized heroin, alleging that the agent did not have a reasonable suspicion, based upon articulable facts, to justify the investigative stop; that the agent lacked probable cause to arrest her; that she did not consent to a search; and that, if she did consent to the search, she did not freely and voluntarily do so.

At the suppression hearing, Agent Anderson testified that, as he observed deplaning passengers from Flight 218, the defendant attracted his attention because she was the last passenger to deplane. Agent Anderson further testified that his experience has taught him that drug couriers deplane last to obtain a clear view of the area inside the terminal, unobstructed by a crowd. He testified that defendant carefully looked about the entire area in a nervous manner as she deplaned as if she were trying to detect police in the terminal area. Because of these facts, Agent Anderson decided to place the defendant under surveillance. The defendant proceeded down the concourse to the baggage claim area but did not claim any luggage. Agent Anderson's suspicions were aroused when he saw that defendant, after taking a long journey, did not stop for luggage. Defendant then took an escalator to the main complex and went to the ticket counter of Eastern Airlines; Agent Anderson continued to follow her to the ticket counter and stood in line behind her. He

was able to observe the defendant present her ticket to the ticket agent and ask for a ticket from Detroit to Pittsburgh, Pennsylvania. Agent Anderson testified that he could see that the ticket defendant handed to the ticket agent was a valid ticket showing an itinerary from Los Angeles to Detroit to Pittsburgh. This intensified Agent Anderson's suspicion because it became obvious to him that defendant was attempting to change airlines to continue her journey to Pittsburgh even though she possessed a valid ticket to the same destination. This further aroused Agent Anderson's suspicions because he testified he had learned through his experience that illicit drug couriers from a primary source city often change airlines to confuse anyone who may know that they are to arrive at a specific time or via a specific airline and to further conceal their arrival from a primary source city. Agent Anderson further testified that the agent at the Eastern Airlines counter told defendant that her ticket was good for her flight to Pittsburgh and that all she needed was an Eastern Airlines boarding pass, which was provided to her. The defendant then headed for the Eastern Airlines boarding area. At this time, Agent Anderson stopped the defendant, identified himself as a federal agent and asked the defendant for identification. The defendant produced an Ohio driver's license that showed her name to be Sylvia Mendenhall. Agent Anderson then requested to see the defendant's airlines ticket. She produced an American Airlines ticket issued in the name of Annette Ford. The agent

asked the defendant why her ticket was in that name while her identification showed her name as Mendenhall. Defendant responded that she felt like using the name Annette Ford. Agent Anderson stated that when he identified himself as a federal narcotics agent, the defendant became extremely nervous and had great difficulty placing her identification back into her purse; he then asked the defendant if she would accompany him to the airport DEA Office for further questioning. She did so.

Upon arrival at the DEA Office, Agent Anderson asked the defendant if she would consent to a search of her person and handbag and informed her that she had a right to refuse to be searched. Agent Anderson testified that the defendant thereupon consented to the search. Upon examining her purse, he found a ticket issued to F. Bush for a flight to California three days previous. He then requested a woman police officer from the airport security force to assist in a search of defendant's person. This female officer, Beverly Mersier, accompanied defendant to an adjoining room, where she again asked the defendant if she was consenting to the search. Officer Mersier testified that defendant replied that she had consented to the search. Officer Mersier further testified that defendant began to remove her clothing and that it was at this time that defendant removed a plastic bag containing a brown substance from her brassiere and handed it to Officer Mersier. As she began to further disrobe, defendant handed Officer Mersier another plastic bag which she had extracted

from her undergarments. Officer Mersier then handed the two plastic bags to Agent Anderson, who was waiting in an adjoining room. Upon these facts, the government contends that the initial stop was founded upon reasonable suspicion, that defendant was not placed under arrest until after the search resulted in the discovery of alleged narcotics on defendant's person, that defendant freely and voluntarily consented to the search after being informed that she had the right to refuse to give such consent, and that the evidence found as a result of the search should not be suppressed because it was legally obtained.

A law enforcement officer may approach a suspicious individual for investigative purposes when the officer's observations, coupled with his experience and training, give him a reasonable suspicion that a person is engaging in criminal activity. In order to justify such an intrusion, however, the officer must "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968). In determining the reasonableness of the investigative stop, it is proper for the court to take into account the officer's experience, training and knowledge. 392 U.S. at 30.

We have concluded that Agent Anderson's investigative stop of the defendant was a justifiable intrusion. Agent Anderson testified that he has had ten years' experience as a federal narcotics agent;

that he has attended several training sessions and seminars to prepare him for his duties; that he has been assigned to the airport detail for more than a year and, in the last year alone, has made approximately 100 arrests at the airport. Additionally, Agent Anderson was able to testify to several articulable facts that gave rise to a reasonable suspicion on his part that the defendant was engaging in criminal activity: the defendant was arriving from a flight originating in a primary source city for narcotics entering the Detroit area; she engaged in a common tactic of illegal drug carriers, namely, remaining in the aircraft so as to be the last passenger to deplane; when she did deplane, she nervously scanned the entire area as though she were attempting to locate anyone who might be observing deplaning passengers. At this point Agent Anderson acted properly by merely placing her under surveillance. The results of his surveillance produced additional facts that justify the initial investigative stop. He observed that the defendant did not attempt to claim any luggage, although she had presumably just completed a long journey. The agent knew from his experience that drug couriers carry little or no luggage, *See United States v. Van Lewis*, 409 F.Supp. 535, 538 (E.D. Mich. 1976), and then his suspicions were further confirmed when, standing behind the defendant at the Eastern Airlines ticket counter, he observed that she did indeed arrive from Los Angeles, a major drug import center. Finally, Agent Anderson observed that defendant was switching airlines

to reach a destination for which she was already ticketed. We conclude that when all of these factors—flight from a source city, last passenger to deplane, the nervous scanning of the entire airport area, apparent lack of luggage although coming from a great distance, the changing of airlines without apparent justification even though in possession of a valid ticket to the same destination—are found to coincide, a *Terry* type intrusion in order to determine defendant's identity and obtain more information is justified. See *Terry v. Ohio*, *supra*; *Adams v. Williams*, 407 U.S. 143, 146 (1972).

The agent's action, in asking defendant to show him some identification and her airline ticket, was "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, *supra*, 392 U.S. at 20, *see also United States v. Brignoni-Ponce*, 442 U.S. 873, 881 (1975), *citing Terry*, *supra*, 392 U.S. 1, 29. It constituted an appropriate manner of investigating defendant's suspicious activity further. The airline ticket that defendant produced, rather than dispelling the agent's suspicions, *see Terry*, *supra*, 392 U.S. at 28, only served to heighten them—it demonstrated that defendant was traveling under an alias, a known tactic of illegal drug couriers, *see United States v. Van Lewis*, *supra*, 409 F.Supp. at 538. Nor did defendant's unsatisfactory explanation that "she felt like using that name" allay the agent's heightened suspicions that she was engaged in criminal activity. Thus, the agent properly sought to continue his in-

vestigation by requesting that defendant voluntarily accompany him to the DEA Office at the airport. The court finds that defendant did so accompany Agent Anderson to the airport DEA Office "voluntarily in a spirit of apparent cooperation with the [agent's] investigation", *Sibron v. New York*, 392 U.S. 40, 63 (1968), and that she was not placed under arrest at some time prior to the conclusion of the search.¹

The defendant contends that she did not consent to the search, and that even if she did, such consent was not freely and voluntarily given. The testimony of Agent Anderson and Officer Mersier, which the court finds credible, is to the contrary. Both testified that defendant gave her consent to the search and the court finds that such consent was freely and voluntarily given. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The evidence, then, was discovered after

¹ The court finds that defendant was not placed under arrest at any time prior to the conclusion of the search, notwithstanding Agent Anderson's testimony that he would have compelled defendant to accompany him had she not voluntarily agreed to do so. This subjective viewpoint of the agent is not controlling—it was not communicated to the defendant and she was not of the view that she was not free to go. See W. LaFave, "Street Encounters" and the Constitution: *Terry, Sibron Peters and Beyond*, 67 Mich.L.Rev. 39, 63n. 117, 101-05 (1968). Moreover, if the court relied on Anderson's subjective view to determine whether and when an arrest occurred, the effect would be to suppress the evidence, since no probable cause existed at this point in time. However, to do so would only punish the agent for that which he would have done had defendant elected to not voluntarily accompany him. The court will not subscribe to such an absurd result.

a legal stop and a consensual search and not as a product of an illegal stop, an arrest (legal or illegal) or a nonconsensual search. As such, defendant's motion to suppress the evidence must fail. Moreover, the court notes that, although Agent Anderson did not arrest defendant until the search of her person was concluded, he possessed probable cause to effect her arrest prior to his summoning of Officer Mersier. When the agent saw the contents of defendant's purse and found the second airline ticket, he was apprised of the following facts: defendant had been in Los Angeles, a known primary source city for contraband narcotics; she had deplaned last, a known tactic of illegal drug couriers, utilized so as to gain a clear view of the terminal upon exiting the plane; she had nervously scanned the area as if she were trying to spot anyone who might be watching her and the deplaning throng, a common mannerism among drug couriers; she did not have any baggage, although she had been on a long distance journey (also known to be a common identifying habit of drug couriers); she had effected a switch in airlines to a destination for which she already possessed a valid ticket (Agent Anderson testified that he had learned, in the course of his experience and training as a DEA Agent, that drug couriers often switch airlines to cover their trail [*sic*] and to confuse anyone who might be attempting to follow them or place them under surveillance); defendant was traveling under an alias, a common tactic of illegal drug couriers; defendant had traveled to Los Angeles, a pri-

mary source city, three days previous to her landing at the airport in Detroit, and travel to and from primary source cities is a characteristic of drug couriers; she had traveled to Los Angeles under yet another alias; she was ostensibly from Cleveland, but was flying a circuitous route if she were homebound (thus, possibly setting up an innocent-looking route home from Pittsburgh—if anyone were to check on her arrival in Pittsburgh, they would see that she had arrived on a flight originating in Detroit, not Los Angeles, because of the airline switch); and she offered no satisfactory explanation of any of these circumstances. Although each of these facts, in and of themselves, are relatively innocuous and innocent, when all of them are found to coincide, and all of them are known characteristics of airborne drug couriers, they furnish the officer observing them with probable cause. To hold otherwise would be to direct DEA Agents to forget all of their training and experience, to ignore the obvious, and to not use all of the education and investigative know-how which they are required to acquire and cultivate in order to obtain and keep their jobs.

The defendant did not appear at the time and date scheduled for the evidentiary hearing on her motion to suppress. Defendant's counsel sought to adjourn the suppression hearing and objected to the court proceeding in the absence of the defendant. Counsel contends that the defendant had a right to be present at the suppression hearing. We have concluded, however, that the right to be present at a suppression

hearing is waived by a voluntary absence. *United States v. Dalli*, 424 F.2d 45, 48 (2d Cir. 1970). This is especially true in the circumstances of this case. Upon defendant's representations that she was having a pregnancy-related problem, we granted prior adjournments of the suppression hearing. On July 26, 1976, the court scheduled the hearing for August 23, 1976; on July 28, 1976, the defendant's counsel requested an adjournment of the hearing until August 30, 1976, which was granted; on August 23, 1976, defendant's counsel again requested that the hearing be adjourned until September 27 which was also granted; finally, at defendant's counsel's request the parties stipulated to a date certain, October 18, 1976, on which date the hearing proceeded. This latter adjournment necessitated adjourning the trial date.

Defendant's counsel has now represented to the court that she advised the defendant of the date for her suppression hearing. Moreover, counsel advises that she communicated by telephone with the defendant's mother who assured counsel that the defendant was in Detroit, supposedly for the suppression hearing. It is clear to us that defendant's absence is purely a voluntary one. To hold that defendant has not waived her appearance by a voluntary absence would produce absurd results. It would permit the defendant to manipulate this court's docket at will. This is especially so after the court endeavored to make the date for her suppression hearing as convenient as possible for the defendant to be present at

the hearing. The date the hearing was conducted was selected by the defendant's counsel.

Accordingly, IT IS ORDERED that defendant's motion to suppress evidence be and the same hereby is denied.

/s/ Robert E. DeMascio
ROBERT E. DEMASCIO
United States District Judge

Dated: November 18, 1976

Pursuant to Rule 77(C), Fed. R. Civ. P. copies mailed to attorneys for all parties on November 18th, 1976.

/s/ Laverne Doss
Deputy Court Clerk



APPENDIX

FILED

NOV 13 1979

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1821

UNITED STATES OF AMERICA,

Petitioner

—v.—

SYLVIA L. MENDENHALL

ON A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 5, 1979
CERTIORARI GRANTED OCTOBER 1, 1979



In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1821

UNITED STATES OF AMERICA,

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—v.—

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ON A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

	Page
RELEVANT DOCKET ENTRIES	1
TRANSCRIPT OF OCTOBER 18, 1976 SUPPRESSION HEARING	3
ORDER GRANTING CERTIORARI	39

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Cr. 6-80208

THE UNITED STATES

v.

SYLVIA L. MENDENHALL

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
2-10-76	Complaint Filed
4-20-76	INDICTMENT
7-23-76	Motion of Defendant Mendenhall To Suppress Evidence; and Notice of Hearing Before Judge DeMascio (No time or date set for hearing).
8-18-76	Government's Answer to Defendant's Motion to Suppress.
9-8-76	Order Re That Hearing On Defendant's Motion to Suppress Is Adjourned To October 18, 1976 at 9:00 a.m.
11-18-76	Memorandum and Order Denying Defendant's Motion To Suppress Evidence As To Defendant Mendenhall, Filed and Entered
11-29-77	Motion Hearing Held to Suppress Evidence—Motion Denied
11-30-77	Order Denying Defendant's Motion for Rehearing on Motion to Suppress.
11-30-77	Stipulation Between Defendant, U.S. Attorney, and Her Attorney
11-30-77	Bench Trial Begins—Bench Trial Held—Bench Trial Ends. Court Judgment of Guilty on Count 1.
11-30-77	Notice of Appeal by Defendant Mendenhall of Final Conviction Entered In This Action on November 30, 1977
1-20-78	Defendant Mendenhall Sentenced—Bond Exonerated

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 78-5064

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

SYLVIA MENDENHALL, DEFENDANT-APPELLANT

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
12-12-77	Copy of Notice of Appeal
3-1-78	Certified Record (1 Vol. Pleadings, 2 vol. transcript) filed; and cause docketed.
10-20-78	Judgment of the District Court Reversed Without Opinion (Weick, Lively, and Merritt, JJ.)
12-18-78	Petition For Rehearing With Suggestion for Rehearing <i>En Banc</i> .
1-12-79	Order Vacating Previous Judgment of This Court, Staying The Mandate and Restoring the Case To the Docket As Pending Appeal (Phillips, J.)
4-6-79	Judgment of the District Court Is Reversed and Remanded for Further Proceedings (Edwards, Weick, Celebrezze, Lively, Engel and Keith, JJ.)
4-6-79	Opinion Per Curiam; (Weick, J. Dissenting)
4-30-79	Copy of letter from Clerk of Supreme Court Advising Counsel that time for filing petition for certiorari was extended to June 5, 1979.

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Criminal Number 6-80208

UNITED STATES OF AMERICA, PLAINTIFF

—vs.—

SYLVIA MENDENHALL, DEFENDANT

Proceedings had and testimony taken in the above-entitled matter before the HONORABLE ROBERT E. DeMASCIO, United States District Judge, on Monday, October 18, 1976, commencing at or about the hour of 10:20 a.m.

APPEARANCES:

VICTORIA TOENSING, ATTORNEY

On behalf of the Government.

RENE SIEGAN, ATTORNEY

On behalf of the Defendant.

[3]

Detroit, Michigan
Monday, October 18, 1976
10:20 a.m.

THE CLERK: Case number 6-80208, the United States versus Sylvia Mendenhall. Are counsel ready?

MS. SIEGAN: Your Honor, I have taken the opportunity to do some abbreviated research on this point, checking the annotations under Rule 43 of the Federal Rules of Criminal Procedure. I don't think the Rule is real clear as to the circumstances we now face. It certainly states that a Defendant—that the trial cannot continue in the Defendant's absence unless that absence is a voluntary one. It speaks about arguments and conferences in the exceptions. And I suggest to this Court that this hearing is very much like a trial, rather than an argument on a point of law in which an attorney can converse with the Court without a client present.

Witnesses are going to testify. My client has a right to confront those witnesses under the Sixth Amendment to the Constitution. I need her here in order for her to properly exercise that constitutional right. Now, in this brief research that I have done, I have got a—in *United States versus McPherson*, which is a District of Columbia case decided in 1969, an opinion written by Chief Judge Bazelon, [4] and the circumstances in that case were not exactly the same as in this case, but the reason that I'm bringing it to the Court's attention is that it speaks of how one is to determine whether an absence was voluntary.

It appears from reading this case at page 1129—I'm sorry. Did I give you a citation? 421 F2d, 1127. At page 1129, the Court speaks of the fact that the voluntariness of the absence from the courtroom must be determined by whether the warning given to the Defendant was sufficient. In other words, whether he understood he was voluntarily waiving a constitutional right. It also refers to the case of *Johnson versus Zerbst*, and it reiterates the standard which is the constitutional

waiver as an intentional relinquishment or abandonment of a known right or privilege flowing from the United States Supreme Court. And I maintain that this Defendant has not indicated to this Court in any way that she has voluntarily abandoned her constitutional rights. I do not know why she's not here this morning. There may be an excuse that this Court will find suitable. I have not found that she has ever purposely fled from the Court's jurisdiction. She certainly has been negligent on a couple of times, but she has also turned herself in. She has never fled from the jurisdiction. She's always been at the address she said she would be at. So, I maintain this hearing should not take place outside [5] of her presence, and I cannot properly represent her best interests without her presence.

MS. TOENSING: Your Honor, the Government would like to cite the case of *U.S. versus Dalli*, D-a-l-l-i. The cite is 424 Fed2d 45. It's a Second Circuit case in 1970.

The Court basically holds that a Defendant has a right to be present at a suppression hearing. However, that right is not absolute, and that it may be waived on a voluntary basis.

Looking at the facts in the *Dalli* case, there was a Defendant that was from Canada. He did not take the necessary—make the necessary arrangements to be present to cross the border, and the Court held that since he had not contacted the Court, since he had not contacted the prosecution, and since he had not made any arrangements that were necessary for him to go across the border, there was no violation. This constitutional right to not be present at a suppression hearing—the Second Circuit cites *Johnson v. Zerbst*. The cite is 304 U.S. 458, as the precedent for saying that there was, indeed, a voluntary waiver on these facts. I say to you in this present situation, Defendant has not shown up for two previous Court appearances. She certainly knows what that means. And now, on this third time, she has voluntarily shown that she does not want to be present, even though she has received [6] notification from her attorney as was brought out earlier.

THE COURT: In the first instance, the Court cannot agree with your position, Ms. Siegan. In the first place, her voluntary absence is quite clear. This record shows that not only did she not appear at two prior settings of this suppression hearing, but on this date she certainly had adequate notice. You have indicated to the Court that you forwarded a letter. You communicated by telephone. The mother of the Defendant said, yes, she received that letter. You have not heard from her. She is not in a position either through her legal counsel, or anyone else, to explain to this Court or to the lawyer who is ready for this proceeding, why she is not here. Her mother indicated to you that she does not know where she is at. She thinks she is in Detroit and is going to appear. This is a case where the Defendant has been entirely at liberty. Indeed, she has a constitutional right to be present. She has a constitutional right to have this Court make Findings on a suppression hearing. But that constitutional right that she has is qualified by the requirement that she be here when the Court is prepared to afford her the constitutional right that she claims she is entitled to.

She has clearly voluntarily absented herself. And *United States versus Dalli* is in point authority for the proposition that a suppression hearing may go forward [7] without her. And if it were otherwise, this Defendant could have it within her means to set this Court's schedule to time the suppression hearing when and if she pleased to have it. She could, at the same time, continually delay the trial on the issue of guilt. In short, she could be in charge of her entire destiny after having committed an offense. That cannot be. These proceedings will go forward.

MS. TOENSING: The Government is ready to proceed if you would like me to call my first witness, your Honor.

THE COURT: Yes.

MS. SIEGAN: I move that the Court sequester any other Government witnesses that may be asked to testify in this matter.

THE COURT: Are there any other witnesses present?

MS. TOENSING: Yes, your Honor. Ms. Mercier from the airport.

Your Honor, at this time I would like to call Special Agent Thomas Anderson to the stand.

THOMAS ANDERSON

having been first duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified upon his oath as follows:

[8] DIRECT EXAMINATION

BY MS. TOENSING:

Q Will you state your name, please?

A Thomas R. Anderson.

Q And your occupation?

A I'm a Special Agent with the Drug Enforcement Administration.

Q How long have you been employed with the Drug Enforcement Administration?

A I have been with the Drug Enforcement Administration approximately seven years. Prior to that—I'm sorry. I'll qualify that.

I've been with its predecessor agency as well as the Drug Enforcement Administration approximately ten years total.

Q And what kind of training have you had for this?

A Well, I have gone through the basic agents' training school, which is in Washington, D.C. for approximately sixteen weeks. I have attended a number of followup seminars in Washington, as well as here in Detroit.

Q What is your present assignment with the DEA?

A I'm assigned as a special agent with the Metropolitan—Detroit Metropolitan Airport detail.

Q How long have you been at the airport?

A Just over a year.

[9] Q And in that time, approximately how many arrests have you made that involved illegal narcotics?

A I have either made, myself, or been involved in approximately one-hundred arrests.

Q Were you on duty February 10, at approximately 6:25 a.m.?

A Yes, I was.

Q What was your assignment at that time?

A I had just begun a routine shift. We work more or less on a shift basis out at Metro, the shift beginning just before six and ending around four in the afternoon.

Q What are your duties in connection with the airport?

A We are looking for people who are bringing narcotics through Detroit Metropolitan Airport.

Q And looking for people who bring narcotics to the airport, do you use such a thing as a drug profile or—pardon me, a profile?

A What we are looking—you may call it—that would be just a term to use. You may call it that. I would consider it to be just a number of things that, through our experiences, we have been able to observe that are just not normal for the average individual coming through the airport. It's made up of a number of characteristics.

Q Could you list a few of these characteristics?

A One would be for a person to be traveling under an alias, an [10] assumed name, extreme amount of nervousness, a person traveling from what we consider to be a source city for narcotics, switching flights, arriving on one flight—I'm sorry, leaving on one flight or one particular airline, coming back on another airline, switching possibly midway or enroute to their destination to a different airline, little or no baggage. These are some of the things.

Q On February 10, 1976, at approximately 6:25, what flight were you watching?

A Myself and another agent working with me, Special Agent David Myhills, who is assigned with the Alcohol, Tobacco and Firearms Unit, he works for that agency. He was on assignment with the DEA on the airport detail. We both were observing passengers as they arrived on Flight 218 from Los Angeles, California, American Airlines.

Q Do you know where Mr. Myhills is today?

A I talked with him last week. He was sick.

MS. SIEGAN: Objection, your Honor. It sounds like it's going to be an hearsay answer.

THE COURT: Overruled. If you are going to make an objection, I will recognize you if you stand up.

MS. SIEGAN: Thank you, your Honor.

THE WITNESS: He advised me he was sick. [11] As far as I know, he still is.

Q (By Ms. Toensing): Why would you be watching the flight from Los Angeles?

A Because Los Angeles is probably, in my opinion, the primary source city for heroin coming into Detroit.

Q What did you observe, if anything, from this flight?

A We watched all the passengers exit the aircraft. The last individual to exit the aircraft was a Negro female who we observed as she came from the aircraft down the jetway. She completely scanned the whole area where we were standing.

Q Is there anything significant about you—to you about the person being the last one off the plane?

A Yes. A lot of these people know of our presence at Metro Airport.

MS. SIEGAN: Your Honor, I'm going to object. This witness is now trying to substantiate his testimony. Let's just hear what he has to say about it and let the Court draw the conclusions.

THE COURT: He is not giving his opinion, Ms. Siegan, I do not believe. He is giving us his reasons for believing that the last to deplane has some significance, and I think the question is proper. He may answer it.

MS. SIEGAN: All right.

THE WITNESS: Many times they, knowing [12] that we are watching some of these flights, especially on a flight such as this which arrived very early in the morning—there's very few people around the terminal or in the gate area, they'll be the last one off. Thus, they know that most of the passengers have preceded them and the area should be fairly clear. They can see who is left behind or who may be watching them.

Q (By Ms. Toensing): Did you put her under surveillance at this time?

A Yes, we did.

Q And what occurred at that point?

A She walked very, very slowly down the—she went down the escalator to the lower concourse which leads to the American Airlines baggage claim area.

Q Did she go to the baggage area?

A Yes, she did. She proceeded to the baggage claim area. She did not pick up any bags. She approached a—

Q (Interposing) Wait a minute. Is that significant to you, that she did not pick up any baggage?

A It's significant in the fact that she had traveled a great distance without carrying any baggage.

Q When she did not pick up any baggage, what did she do?

A She approached an American Airlines skycap. I was right behind her. I overheard her ask him as to directions to the Eastern [13] Airlines ticket counter.

Q What did she do at that time?

A She then proceeded up the escalator, up an escalator there into the South Terminal where the airlines ticket counters are located. I followed her up there and she walked directly to the Eastern Airlines ticket counter.

Q Did you observe, or hear anything at that time?

A I did. I stood in line directly behind her, and she retrieved an airline ticket from her purse, presented that to the Eastern ticket agent and asked for a ticket, an Eastern ticket, to be used by her on a flight from Detroit to Pittsburgh.

Q Could you observe the ticket that she had in her hand?

A I could. She held it directly in front of her and I could observe it very easily. The itinerary on the American Airlines ticket showed a flight from Los Angeles to Detroit to Pittsburgh.

Q Was it significant to you that she was already ticketed to Pittsburgh and yet was asking for another flight to Pittsburgh on another airlines?

A Yes, it was.

Q Why?

A In my experience, people will do this. They will ticket on one airline. In this case she was changing enroute to her destination to a different airline. They oftentimes do this in case anyone realizes that the date, the airline, the time that they [14] are to arrive at their destination—deliberately change airlines and flight time to arrive at a different time.

Q What did the Defendant do at that time after she had requested another airline?

A The Eastern representative advised her that her American Airlines ticket was valid, was good, that all she needed was an Eastern boarding pass, which they gave her and she proceeded on down the concourse toward the—to board the Eastern flight.

Q What did you do at that time

A Oh, approximately halfway down the concourse, Agent Myhills and myself approached her, identified ourselves as Federal agents, and I requested some form of identification from the girl.

Q Did she give you identification?

A She produced an Ohio driver's license in the name of Sylvia Mendenhall.

Q Did you ask her for anything else?

A I then asked her if I could see her airline ticket.

Q Did she show it to you

A Yes, she did. She produced the ticket showing the flight itinerary that I previously described. I noted that the name on the ticket was in the name of Annette Ford. I then asked her the reason why she would be traveling under a different name, and her response was, "I just felt like using that name."

Q Did you ask her anything else at that time?

[15] A As I recall, I asked her how long she had been in California, and she stated to me about two days.

Q Is that significant to you?

A In that it's a very short, abbreviated trip to go that distance and return.

Q What did you do next, if anything?

A I then told her that I specifically—that I was a Federal narcotics agent. She became quite shaken, ex-

tremely nervous. She had a hard time speaking. I handed her her ticket back and her driver's license back. She had a very difficult time getting these back into her purse, and at that time I asked her if she would accompany myself and Agent Myhills to our office, which was very nearby, very close, for further questioning.

Q Now, you have testified that you stopped her and began looking for her identification. And now, at this point you asked her to go to the DEA office for further questioning. Would you please approximate how long this took?

A From the time that I just observed her to the time I began to question her.

Q From the time you first stopped her, asking for identification, to the time you asked her to accompany you to the DEA office.

A I would say two or three minutes at the most.

Q What occurred when you went to the DEA office?

A Once inside the office, I asked her to take a seat. She was [16] sitting—I asked her for her consent to search her person as well as her handbag. I stated to her that she had the right to decline the search if she so desired. Her response was "Go ahead."

Q Now, up until this time you had just asked her consent to search her person and her luggage or her bags, could you approximate how long it has been at this time from the initial stop?

A From the initial stop, maybe five or six minutes.

Q All right. What occurred after she said, "Go ahead."

A Special Agent Myhills opened her purse. And among a number of items in her purse was another airline ticket, a United Airlines ticket which had been issued on the seventh of February, showing her flight from Pittsburgh to Chicago to Los Angeles. The name on that ticket was in the name of—the first initial was F. The last name Bush. He asked her if this was the name and this was the ticket that she used on her initial trip to California, and she stated that it was.

Q What happened at that point?

A At that time I placed a telephone call to the Airport Security Police at Metro. I requested that a female officer come to our office to search the Defendant, or search the individual.

Q Is this regular airport procedure when you have a woman suspect?

A Yes, it is.

[17] Q And did someone arrive?

A Yes. A short time later, one of the airport police female officers came to the office, asked Ms. Mendenhall to accompany her to a room there, a private room at the office for the search.

Q When did you see the Defendant again?

A Probably five to ten minutes later. They both exited the room. The police officer handed me a brown paper bag which contained approximately three-quarters of a pound of heroin.

Q What did you do then?

A I placed Ms. Mendenhall under arrest for violation of the Controlled Substances Act. I advised her of her constitutional rights, and then I processed her as a Defendant.

Q Did there come a time when you heard the personal history of the Defendant?

A It was part of this formal processing that I referred to. We take a personal history statement; as far as their name, their address, their date of birth. She stated she was, as I recall, twenty-two years old.

Q Did you learn the educational level of the Defendant?

A She had attended eleven years, or through the eleventh grade of high school.

Q Do you know if she previously had been arrested?

MS. SIEGAN: Objection, your Honor.

[18] MS. TOENSING: May I proceed, your Honor?

THE COURT: Yes.

MS. TOENSING: In order to show a consent search, which is the contention of the Government, there are many factors under *Bustamonte*, and one of the factors is, had the Defendant had encounters previously with the police. I'm bringing the previous arrest record out to show that the Defendant was familiar with police encounters and this would go to the voluntariness of the search.

MS.SIEGAN: I withdraw my objection, your Honor.

THE COURT: All right.

MS. TOENSING: She was asked of any prior arrest history. She stated that she had been arrested once for a traffic offense.

Q (By Ms. Toensing): And is that a previous arrest record?

A As far as the processing part of that, processing is to take fingerprints. The copy of the fingerprints I sent to the Federal Bureau of Investigation in Washington. They in turn send an arrest history back on that individual if they have an arrest history. I received that in the name of Sylvia Mendenhall. She had, according to that, she had two previous arrests; one for shoplifting, another for possession of marijuana.

[19] MS. TOENSING: I have no further questions.

CROSS EXAMINATION

BY MS. SIEGAN:

Q Agent Anderson, when you first stopped Sylvia Mendenhall—pardon me.

When you first saw Sylvia Mendenhall, what drew your attention to her was that she was a black woman traveling alone, and she was the last to get off the airplane, is that right?

A Additionally that she appeared to be very nervous as she came off the airplane.

Q Well, you put her under surveillance because she appeared to you to be nervous and she was the last one off the plane, is that right?

A Not entirely, no.

Q Sir, did she proceed downstairs as one might expect a passenger to do, to check her baggage?

A That's right.

Q And there was nothing unusual about the fact that she went downstairs?

A The fact that she went downstairs, no.

Q But you proceeded to follow her because she appeared to you to be nervous and she was the last one off the plane, is that [20] right?

A As I have testified, she was coming from Los Angeles, which I consider to be a source city.

Q You would acknowledge that on every flight to Los Angeles someone has to be last off the plane?

A Yes.

Q So what was really unusual about this case was this woman appeared to be nervous, is that right?

A She did.

Q All right. Now, in other cases you have a lot of experience in the drug—airport searches for narcotics, don't you?

A I have been involved in a number of them, yes.

Q Over one-hundred, right?

A Arrests. I testified as to arrests.

Q Well, that's what I'm asking you about. You've been involved in over a hundred arrests involving narcotics, right?

A Yes.

Q And one of the things you consider significant is the fact that when somebody does not go downstairs to get their luggage and merely goes off on the concourse on the upper level, is that right?

A For that to be significant, also?

Q Yes, sir.

A It can be.

[21] Q But you do consider that more significant than when someone goes down to the escalators to the baggage area?

A No.

Q You don't consider it more significant than somebody does not go to pick up luggage?

A As I say, it can be. It depends on what they do. Either way, it could be significant, the fact that they go to the baggage claim or the fact that they go to the upper. It could be, but it would have to be coupled with additional facts.

Q All you know about someone is they appear nervous and then they go downstairs to the baggage area, there's nothing unusual about that, is there?

A Other than the fact that she was unusually nervous.

Q But that's the only thing that you knew about her at that point?

A That's correct.

Q Now, have you ever traveled by airplane?

A Yes.

Q And have you ever had a flight that stopped over in another city where you had to change planes?

A Yes.

Q And isn't it your experience that when you change planes in another city where you are not going to stop, but merely pass through, your luggage is transferred from one plane to the other plane for you?

[22] A Remaining with the same airline or a different airline?

Q Let's start with remaining with the same airline.

A Yes, your luggage is transferred.

Q All right. And have you ever transferred airlines?

A From one airline to another?

Q Yes, sir.

A Yes.

Q All right. Have you ever had your luggage transferred for you?

A Yes.

Q So there's nothing unusual about the fact that someone who might be changing planes in Detroit to finish her trip to Pittsburgh would not have her own luggage in her possession, is there, that she would not have picked up the luggage. There's nothing unusual about that, is there?

A Well, at the time that I observed her not to pick up luggage, at that time I didn't know that she was going to transfer, or change airlines.

Q So you certainly didn't consider that unusual then, did you, because you didn't even know what she was doing?

A At that point, I didn't know what she was doing other than the fact that she had come from Los Angeles and she hadn't picked up any bags. I found this significant.

Q All right. Now, you did see her go and stand in line. Indeed, you stood behind her, isn't that right?

[23] A Yes sir.

Q All right. Now, do you know the airline schedule for any airlines that travel nonstop from Los Angeles to Pittsburgh?

A No, not specifically.

Q All right. So then, you don't know there is necessarily a non-stop flight from Los Angeles to Pittsburgh, do you?

A I do not know whether there is.

Q So, there's something significant about the fact that someone might change planes and go from Los Angeles to Pittsburgh and stop in Detroit. You don't have any reason to believe there's something unusual about that?

A Yes.

Q Then you know there's some flights that go non-stop?

A No, but as I say, I observed her ticket. I saw that she was ticketed on American all the way through to Pittsburgh, and I found it unusual that a person would change, after being ticketed all the way through to another airline.

Q Sir, do you know the times and flight that she would have to take from Detroit to Pittsburgh; what time would that plane have left?

A I don't know.

Q What time would the plane have left on Eastern?

A I don't know.

Q So, there's nothing unusual about that. It may be, in fact, [24] something very innocent, isn't that true? It may be that she had to wait longer for the American flight and she found she could take an Eastern flight which would leave sooner, isn't that true? You don't know, do you?

A I don't know the flight time, so I really couldn't respond to that.

Q And you didn't take the time or trouble to determine that before you put her in custody, did you; before you stopped her, before you interrupted her travel?

A No.

Q All right. When you first approached her you told her you were a Federal narcotics agent, didn't you?

A When I first approached her, I told her I was a Federal agent.

Q A Federal agent?

A Yes.

Q All right. Did she, all of a sudden, get very nervous, more nervous because you told her you were a Federal agent.

A When I first approached her I told her I was a Federal agent. She was not nervous.

Q Did you also tell her at that time you had reason to believe she was carrying narcotics?

A No.

Q Did you have a tip in this case?

A No.

[25] Q You were going strictly on what you saw in the airport, is that right?

A A number of things, what my observations, her response to statements.

Q I'm just asking—

A (Interposing) All right. Itinerary.

Q You're going on what happened on February 10 without any prior information?

A Correct.

Q You did not know that Sylvia Mendenhall was traveling to Detroit with narcotics, did you?

A No.

Q Nor any Negro female traveling from Los Angeles on that date carrying narcotics, did you?

A No.

Q Now, once you had stopped Ms. Mendenhall and asked her for her identification and she produced an Ohio driver's license, were you convinced she was Sylvia Mendenhall from that driver's license?

A Well, I considered that to be an accurate identification for her, right.

Q All right. Were you convinced at that point that she was Sylvia Mendenhall?

A Yes, I asked if that address on the license—I asked if she [26] still resided there. She said she did. We had reason to believe that she was Sylvia Mendenhall.

Q And had she put that identification in her purse and walked away from you, you would have stopped her, wouldn't you, because you wanted to ask her some more questions?

A Yes.

Q All right. Now, after she showed you the ticket with the name, was it Annette Ford, was that the name on her ticket?

A Yes.

Q Now, after she showed you that, you decided you wanted to search her and see if she had any narcotics, isn't that true?

A No, not immediately after that. I asked her a question or two regarding the name on the ticket, why it was not her name. I also asked her as to her length of stay in California.

Q All right. Now, when you asked her to accompany you to the DEA office for further questioning, if she had wanted to walk away, would you have stopped her?

A Once I asked her to accompany me?

Q Yes.

A Yes, I would have stopped her.

Q She was not free to leave, was she?

A Not at that point.

Q How far is the DEA office from where you stopped her?

A Probably not more than fifty feet. You have to walk up a [27] stairwell. It is one story up from the concourse, but very short in distance.

Q It certainly took her out of the line of travel which she was outlining for herself; she wouldn't have gone up there on her own?

A She could have gone to that general area, but she certainly wouldn't have gone to our office.

Q Did you use a key to get in your office?

A Yes.

Q And it's a private office?

A Yes.

Q And the public cannot enter unless they knock and are admitted?

A That's correct.

Q Now, when you called this female officer who came and subsequently searched Ms. Mendenhall, you were present when she told Ms. Mendenhall that she wanted to search her, weren't you; weren't you, she asked her to accompany her?

A Yes.

Q And Ms. Mendenhall was told that you wanted her to be searched by this female officer, isn't that right?

A I had previously asked her for her consent to search her person as well as her handbag. She had given permission.

Q To search her person?

A Yes, her body.

[28] Q And you told her you wanted to search her, is that right?

A That was inferred in my question, as far as the consent to search her person and her handbag, and she agreed.

Q Where were you when Ms. Mendenhall was being searched by the female officer?

A I was in a large room adjoining that she was being searched in.

Q Which room is the one that you enter first when you come in the DEA office at the airport?

A It is a reception area. There's normally a secretary's desk.

Q This large room that adjoins the room where she was being searched, does that come first after the reception area?

A Well, it doesn't necessarily come first; I mean as you come in the reception area, you can either go in a room to your left or a room to your right or a room straight ahead. In other words, they all lead off from this reception area.

Q All right. This room she was taken to, was that far away from the reception area?

A No.

Q Can you just explain to me where that room is located, the one in which she was searched?

A Okay. If you were coming in through the reception area, which is a very small outer area, there's a room

directly in front of you. There's this larger room that I described where I was to the right, another room used to process people to the left. [29] As I say, the one room directly in front, one room on each side.

Q Now, where was the one that Ms. Mendenhall was in?

A The one directly in front as you would walk in.

Q Had she tried to leave that room when she was being accompanied by the female officer, would you have known?

A If she had attempted to leave the room?

Q Yes.

A Well yes, I could say that I would have known.

Q And if she had tried to leave prior to being searched by the female officer, would you have stopped her?

A Yes.

MS. SIEGAN: No further questions, your Honor.

REDIRECT EXAMINATION

BY MS. TOENSING:

Q Agent Anderson, is it significant when someone does not pick up luggage after a flight from California?

A It is significant to me when it's coupled with additional things that a person does.

Q And when you began following Ms. Mendenhall, did you observe that she did not pick up her luggage?

A Yes.

Q When you ask a person for identification, it is customary to ask for only one piece of identification?

[30] MS. SIEGAN: Your Honor, I probably should have objected a long time ago, but Ms. Toensing is using leading questions. But I would like to object at this time to ask the Court to instruct her to ask the witness what he does.

THE COURT: Make your questions more direct.

MS. TOENSING: Certainly, your Honor.

Q (By Ms. Toensing): When you ask for identification from a suspect, how many pieces of identification do you ask for?

A Well, initially I ask for one. Normally a person will produce a driver's license. If they produce a driver's license, I consider that to be accurate identification and I would not ask for anything further. If they do not have a driver's license, then certainly we ask for any additional identification that they may have which would show their name.

Q Why did you ask Ms. Mendenhall for another piece of identification?

A The only thing further that I asked from her was her airline ticket.

Q Do you consider that identification?

A Not in itself, no.

Q Why did you ask her for her airline ticket?

A I wanted to again look at her itinerary, and I wanted to look at the name that she used on the airline ticket to see if that corresponded with the name that she had given me on her driver's [31] license.

Q And when you asked Ms. Mendenhall to accompany you to the DEA office, what reason did you give her for accompanying you?

A To ask her additional questions.

Q Did you, at anytime, say she was under arrest?

A No.

Q What were the exact words you used when you requested the Defendant to consent to a search?

A I asked her for her consent to search her person as well as her handbag, and I stated that she had the right to decline the search if she so desired.

Q Why did you use those words?

A Because I feel that is a proper way to present to an individual a consent search.

Q Why did you have Ms. Mendenhall go to the smaller room for her search rather than remain in the outer room of the DEA office?

A Well, I was not going to have her searched in front of the other agent and myself. It's a private room

in which the female officer could take her in there and search her.

MS. TOENSING: No further questions.

RECROSS EXAMINATION

BY MS. SIEGAN:

Q Could you give me a quote as best you can recall, Agent Anderson, how you asked Ms. Mendenhall for her consent?

[32] A Exactly the way I just stated it.

Q Would you repeat it, please?

A I requested of her—

Q (Interposing) Sir, give me a direct quote from yourself, as if I am Ms. Mendenhall. Speak as if you were asking me, how would you say it to her?

A I would like your consent to search your person as well as your handbag, and you have the right to decline this search if you so desire.

MS. SIEGAN: Thank you, sir.

MS. TOENSING: No further questions, your Honor.

THE COURT: You may step down.

[33] BEVERLY MERCIER

having been first duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified upon her oath as follows:

DIRECT EXAMINATION

BY MS. TOENSING:

Q Would you state your name, please?

A Beverly G. Mercier.

Q Your occupation?

A I'm a police officer with Metro Airport Police Department.

Q How long have you been employed there?

A Two-and-a-half years.

Q You had special training?

A Yes, I had three weeks with the Wayne County Sheriff's Department, six weeks with the Detroit Police Academy.

Q Were you on duty February 10, 1976?

A Yes, I was on duty.

Q Were you on duty in the early morning?

A Yes, I was.

Q What was your assignment?

A I was assigned a foot patrol duty that morning. About a quarter to seven, I received a phone call from my office telling me to go and assist the DEA agents on a search of a female.

Q And did you proceed to the office?

[34] A Yes, I did.

Q And what did you observe there when you arrived?

A Upon my arrival at the office, I observed a female, and there were two DEA agents there in the office. I was asked by the DEA agents to give a search on this female. At that time I asked the agents did she consent to the search; they said yes.

Q What did you do at that point?

A At that point I gave the DEA agents my gun.

Q Is that normal procedure?

A That's normal procedure. And then we went into another office where the search took place.

Q Well, would you describe what happened when you went into the other office?

A When I went into the other office, I asked the subject if she consented to the search. At that moment she told me yes, she did. I said okay. It's a strip search. That means everything goes off. And after that, she said—well, she had a plane to catch and I told her—I said, if you don't have anything on you, you don't have any problem. So, she began to unbutton her blouse. After she had taken her blouse off, she pulled out a package. It was a plastic package.

Q Was it in her blouse?

A It was in her brassiere, after which she handed me the package and I took the package. And at that point I told her—I said [35] it was still a strip search, everything had to come off.

Q What did you observe in the package?

A I think it was—I don't know. I can't say what it was. I think it was heroin. I'm not certain.

Q Well, just as far as your eye, I'm not asking you what the chemical analysis of it was, but what was it as far as the description?

A You mean in color content? I think it was brown.

Q What kind of substance was it?

A It was like coffee grounds, or something like that.

Q All right.

A At that point she was taking her time by taking her clothes off. She took her skirt off and she took her pantyhose off and her slip off, and she finally took off her panties, and at that point, she handed me another package that was in her panties and it was wrapped about like that (indicating) in a brown paper bag.

Q And did you open that package?

A No, I didn't open that package because that was turned over to the DEA agents.

Q What did you do after you received those packages?

A I told her she could put her clothes back on and I waited for her to put her clothes back on and I told her—well, I waited for her to put her clothes on. We went out to the office.

[36] Q And what did you do when you went outside the door?

A I handed the two packages, the two bags I had gotten from her.

MS. TOENSING: No further questions.

CROSS EXAMINATION

BY MS. SIEGAN:

Q Ms. Mercier, when you went to the DEA office, you knew you were being requested to search a female for suspected narcotics?

A That's correct.

Q And when you went in and saw the two agents, they again told you they wanted you to search someone for narcotics, is that correct?

A That's correct.

Q And when you have searched other people—have you done this before?

A Yes, I have, yes. This is not the first case.

Q How many times have you done it?

A I can't recall how many times I have done searches on females. I would say maybe in the last two years, maybe ten times, I don't know.

Q Has that always been with the Drug Enforcement Administration, or have you searched women for other reasons?

A I have searched women for other reasons.

Q How many times have you searched people for narcotics?

A I'd say maybe ten times.

[37] Q Ten times?

A I'd say maybe ten. I don't know exactly, but I'd say maybe ten times.

Q How many times have you searched women altogether at the airport?

A I can't recall how many times I have searched women because we do it for the sheriff's department too if there's not a female available on the Wayne County Sheriff's Department. They may call our office for a female to do a search.

Q Have you ever had a case where women didn't consent to the search?

A Never.

Q In all of these cases, the women undress themselves, is that correct?

A That's the normal procedure.

Q You have never undressed anyone, have you?

A No.

Q Now, Ms. Mendenhall was rather reluctant to get undressed, wasn't she?

A I can't say she was rather reluctant.

Q You said—

A (Interposing) She kept saying she had a flight to catch.

Q She kept telling you she had a flight to catch and you said she took her time?

A Right.

[38] Q Okay. And when you went into this room with her, you told her you wanted to search her, is that right?

A I told her that it would be a strip search, and I asked for her consent.

Q Can you give me a quote how you would have said that to her?

A Would you rephrase the question, how I would have said?

Q Pretend that I'm with you in a room and that you have been told to search me for narcotics; how would you tell me that you're going to do it?

A First, I would ask for your consent.

Q How would you?

A Are you consenting to the search?

Q That's how you'd say it?

A Right. And if she says yes, I'll tell her, well, it's a strip search and the procedures are that everything has to come off, all of your clothing articles, your shoes and everything have to come off.

Q When you ask her if she's consenting to the search do you also tell her that she doesn't have to and you will leave her alone?

A I didn't tell her that, no.

Q You just told her you wanted to search her and asked if she was consenting?

A Right.

[39] Q All right.

MS. SIEGAN: No further question, your Honor.

REDIRECT EXAMINATION

BY MS. TOENSING:

Q Did Ms. Mendenhall, at anytime, say she did not want to be searched?

A No.

MS. TOENSING: No further questions.

THE COURT: You may step down.

Anything further?

MS. TOENSING: The Government has no further witnesses, your Honor.

THE COURT: Do you wish to be heard, Ms. Siegan?

MS. SIEGAN: I have no witnesses at this time, your Honor. I would like to argue. Does the Court agree with me that the Government does have the burden?

THE COURT: Yes:

MS. SIEGAN: Then I would like the Government to argue first, then.

MS. TOENSING: Your Honor, it is the Government's contention here that we have a valid investigatory stop, followed by a consent to search. I think what we have to [40] do is just step back a minute on the search-and-seizure question.

THE COURT: Are you contending that the arrest was illegal or—

MS. TOENSING: (Interposing) What arrest?

THE COURT: The agent testified that if she left he would not have permitted her to go.

MS. TOENSING: The agent testified that he was to retain her for further questions, your Honor. The Government contends that as being an arrest, and I would like to present my argument to show you why that is so. The Government contends that police officers have a right to stop a person and to question a person for investigation purposes, and this is a detaining stop. And that as more and more facts are developed to the police officer, he or she may continue to stop and ask further questions of a suspect.

First of all, what I'd like to do is just set out a way that I think the search-and-seizure questions have to be approached. We have to determine at each stage whose activity and whose experience and knowledge we're observing. Now, in a stop, there's really two parts of a stop. Under *Terry v. Ohio*, in order for it to be a valid stop, the first part is, was there a reasonable suspicion that there was a crime afoot. On that part of it, we have to look to the [41] experience and to the knowledge of

the police officer. We could have asked ourselves what, in his experience and knowledge, made him or her believe that there was crime afoot. The Government sets out in this situation what we have that was in the police officer's knowledge. First, we have a flight from a major drug import center. The woman was the last off the plane. As the agent testified, that is significant because many times in his experience as an agent, people carrying illegal drugs are either the first or last off the plane. She was looking around the airport. He described it as nervously. The Government contends that that agent should not only be able to specify, to give specifics as stated in *Terry*, as to what those things are that attracted him to a suspect, but then also present what conclusions this presented to the agent. Looking around, glancing around the airport. To this agent, the suspect appeared nervous. At that point, let's look at the officer's activities. At that point, the suspect was put under surveillance and that was all. Under surveillance. The officer observed that she walked slowly toward the baggage area. However, she did not go to get baggage.

We can't look, when we're studying a search-and-seizure question, we can't say the drugs were there, therefore, there's probable cause. We can't do that with the agent. We can't say she was going to change flights so you [42] should have known it was a suspicious act. To this agent, in his experience, someone from Los Angeles and not picking up baggage is a suspicious activity, prompted him to further investigate when she went to the ticket counter. When he went to go get more information, he picked up more information than was even more suspicious. The suspect at that time had a ticket from Los Angeles to Detroit to Pittsburgh. She was changing flights to go the same distance, just another airline. The agent testified he wasn't aware of the various flight schedules. To him, he didn't know if she was making a better deal as far as time connections. He testified in his experience, people who have been carrying illegal drugs have been known to change flights. Again, the officer is acting on his knowledge and experience and his activities at each point are conducted within that framework. He

didn't promptly go up to the Defendant when she got off the plane and acted nervous and stop her. He stopped her, he's building his case, when he learned that she got a boarding pass and was heading to the Eastern Airline area to board the plane, he stopped her. It is at that point the stop took place. And the Government contends that to not have stopped her would have been—by the way, *Adams versus Williams*, 407 U.S. 143, says the same thing in a little more eloquent language. It says, and it's talking about the *Terry* case also and it quotes: "The Fourth Amendment does not require a policeman to collect the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry v. Ohio* recognizes that it may be the essence of good police work to adopt an intermediate response."

This is the intermediate response.

The first question he asked her was for her identification. When she showed a name on that identification, he asked her for an airline ticket. It was a different name. It was more information coming into the agent's mind now, that there may be a crime afoot, even leading to a probable cause situation. He asked her how long she had been gone, two days, a short trip. And he said, "I'm a Federal narcotics agent." He testified she became nervous. She was shaking. She couldn't put her ticket back into her purse. She was having a hard time talking. It was at that point that the agent said, "I would like you to come with me to the DEA office for further questioning." The scope of the investigation is continually being relayed to the officer. That's the other part of *Terry* that needs to be valid. We have to say, and *Terry* talks about it. It says in an appropriate manner. The first part is in an appropriate circumstance. A person may be stopped, and there, *Terry* says in an appropriate manner. This is an appropriate [44] manner. We're talking about the building of a case and getting more facts, and when the facts continue to add up to be suspicions, then the officer can continue to ask questions.

He asked her to the DEA office, more private place, and at that point he didn't place her under arrest. He asked her would she consent to a search. This is not an arrest. At no time did he tell her she was under arrest. And that's important now, because we're coming to the consent. If he was placing her under arrest, that would be important for her voluntary consent. But when we go to the consent issue, we aren't looking at the activities of the police officer anymore. If he says, well he would have stopped her if she had run out of the DEA office and wanted to leave the DEA office. We aren't concerned now with his thoughts and beliefs. He, at no time, told her she was under arrest. Now, we have to look at the Defendant, the suspect and what she perceives. At this point she perceives she has a question. She is told that she can consent to the search or she can refuse it. She's been placed under arrest before. She is twenty-two years old. She has an eleventh grade education. At this point, we have to look at the facts under *Bustamonte*. Was the fact that she was told that she could refuse the search certainly isn't even necessary under *Bustamonte*. The fact that she was only questioned, never at anytime told she was under arrest, that she has an eleventh grade education and is twenty-two years old and has been under arrest before. These facts yield that she is capable of giving a voluntary consent, and the Government says they have you view this thing, keeping in mind also whose experience, whose activities are to be viewed at what point in time that you can come up with nothing except a voluntary investigation stop is a consent search, is a valid consent search. I will cite—I left the cities on my cases back at my desk. I will give them to your law clerk. I will not belabor you with the facts at this time, but there were two instances where the Court looked very closely at each thing that occurred as an officer began to build the case, and I think the Court would like to read that in order to reach a decision on this.

MS. SIEGAN: This Court has had the opportunity to hear a number of evidentiary hearings on airport searches and has decided in at least three of those cases

that I know of, in facts very similar to this, that the stopping of the individual based on a limited number of these criteria when an individual is not free to leave and is asked to accompany the officer to a more private place is, indeed an arrest. So I cite this Court's own precedent to it. I contend that when Ms. Mendenhall was stopped—

THE COURT: (Interposing) Well, you will have to give me those cases. I have never held or ruled that a mere stop is an arrest.

[46] MS. SIEGAN: No, I'm saying, your Honor, that when the agent asked the individual to accompany him to a more private place, this Court has ruled that this was an arrest although words of arrest were not used.

THE COURT: I have never held that, Ms. Siegan. The closest I have come to that, may be your reference to this Court's opinion in *U.S. versus Blount*, except that Blount had made the statement that she wished to go to the bathroom.

MS. SIEGAN: That's correct, your Honor.

THE COURT: Well, you do not have to have special words to say I want to leave, or I am not going to accompany you. Any word that indicates that—for example, she may have had in her mind that she was going to go in the bathroom and not come out. She may have had many things in her mind, but the point is she made the statement, "I'd like to go to the bathroom," twice.

MS. SIEGAN: That's right, your Honor.

THE COURT: And not getting permission to permit her, I would say an arrest occurred.

MS. SIEGAN: Perhaps I don't understand the Court's ruling in *United States versus Daniels and Hilton*. I have a copy of the Court's opinion in front of me, and it seems to me that the Court says that—

[47] THE COURT: (Interposing) Now, if I remember *Hilton*, I ruled on *Hilton* that there was no justification for the stop.

MS. SIEGAN: That's correct, your Honor.

THE COURT: Because in that case, and that case must be restricted to its own facts, the agent testified in clear terms, that if she had not been accompanied by

Daniels, he would not have even followed her, observed her, stopped her or anything else. So in that case, I think I ruled that when she returned from the bathroom, she was obliged to say, "You may leave, you may accompany us or you may wait here." He did not do either of those things and said, "You are coming with us." And that was the arrest.

MS. SIEGAN: Perhaps I could continue with the facts in this case and convince the Court that when Ms. Mendenhall was asked to accompany Agent Fred Anderson, she was, indeed, under arrest.

THE COURT: Well, Ms. Siegan, perhaps you can clear up a point for the Court.

MS. SIEGAN: All right.

THE COURT: If a person has an airline ticket from Los Angeles to Detroit to Pittsburgh, their luggage, if they had any luggage, would not be removed unless there were arrangements made for the removal. When that plane stopped in [48] Detroit, there would be no removing of luggage from the plane for all passengers who were ticketed to Pittsburgh. Now, that is common knowledge.

MS. SIEGAN: Are you assuming that the same plane went to Pittsburgh?

THE COURT: Yes.

MS. SIEGAN: I'm saying that there were many situations when an individual flies that he is ticketed to stop over in another city, and his baggage is removed for him and placed on another plane.

THE COURT: If that plane is not going to Pittsburgh, then all those who are ticketed from Los Angeles to Detroit to Pittsburgh are going to have luggage removed.

MS. SIEGAN: That's right. And they aren't necessarily going to touch that luggage, your Honor. The airline may move it for them.

THE COURT: May move it where?

MS. SIEGAN: To another plane.

THE COURT: What plane, in this case, would they remove it to?

MS. SIEGAN: The agent testified that she had an airline ticket from—that took her from Los Angeles to Detroit to Pittsburgh.

THE COURT: Then the luggage would [49] have to go to the American Airlines plane.

MS. SIEGAN: That's true. He testified that it was in his experience that sometime people connect on different airlines and that luggage may be moved. Her moves were anticipated. We don't know whether the airline was moving the luggage for her or not. There is no testimony that she had luggage or did not. All I'm saying in argument to this Court that the agent, with the knowledge that he did receive by watching her stand in line and change flights from an American flight to an Eastern flight, the only thing he noticed is that she changed flights. He doesn't know whether she did for her own convenience or whether she had other luggage that was going to fly on the American flight and that she would pick it up in Pittsburgh later. There's nothing wrong with when you pay for your ticket, having put it on the airplane in Los Angeles, your luggage is also ticketed to go to Pittsburgh. If you get there on an earlier plane and you pick up your luggage, there's no indication that the agent took the time to find that information out. And he's asking the Court to assume, just on the face of it, because of the fact that she stopped in Detroit and then went on to Pittsburgh and was changing flights, there's something incriminating about it, or something that should fit in a profile, that there's something that would indicate that she was a suspicious traveler. I'm saying there's nothing suspicious [50] about it. I'm saying it was something done commonly. What he knew about her at the time he stopped her was that she was acting nervous. He does not know why, he does not know whether she was a person who was a poor traveler. This Court could probably take notice of the fact situation. We know from her doctor, and he has attached a motion (sic) that she was pregnant at that time. It's possible that that was affecting her. She was apparently three months pregnant. All we know is she was nervous-look-

ing to him, but he didn't give us any outside information, he didn't attempt to check it, he didn't ask why she looked like she did. He apparently could have found—all we know is she appeared nervous. The fact that she was the last off the plane is of no significance to me. Somebody has to be the last off the plane. It turns out to be a black woman traveling alone. Is that more suspicious than a white woman who is traveling alone? I don't see anything suspicious about the fact that she was the last off the plane.

He says that she was looking around. We don't know whether she was looking for someone, whether someone was possibly going to meet her in Detroit in between flights. There's nothing inherently wrong with the fact that she was looking around. And by the way, the time he saw her looking around, he didn't know she was going to take another flight. So it may be that he could have easily thought, were [51] he not a drug agent looking for people who were curriers, and imagining so much more, being attached to these kinds of insignificant things that people do when they get off the plane. If you just saw someone looking around, you may have thought that she was waiting for someone. Instead, he attached a great deal more significance to it because she happened to be a black woman who was the last person off the plane and appeared to be nervous. He follows her, and she goes down some stairs, or down an escalator and goes to another airline where she is working on getting a flight to Pittsburgh. He doesn't have any information there are non-stop flights to Los Angeles to Pittsburgh, so it appears unusual that someone would stop in Detroit. We have no information about that, and he doesn't take the time to learn it. What does he decide to do instead? He decides to stop her because that's the easiest thing to do. So, it's a lot easier to detain her than to ask his one agent to watch her and the other one to check on it. These are things that could be checked on very quickly. They have access to airport information.

This Court has heard testimony in other cases where whole flight records are available to them. They go to

the right ticket agent and quickly find out information. But they chose not to. Instead, it's easier to stop people and have no feeling of letting them go on until they [52] search them. So, when he stopped her, he did not intend to let her go. When she gave him identification in her own name, she satisfied his inquiry. When he asked her for a ticket, he was already searching. The information he derived off of that ticket is information that he got from her by searching her, by asking for the ticket when she was not free to leave. At that point, he was no longer establishing more factors in order to build probable cause. He had already arrested her. And this is all bootstrapping. It's all hindsight now, to say this was a *Terry* stop; he was just investigating her. He never intended to let her go and he admitted that.

All right. When he asked her to go in the room with him, she was already under arrest. She could not leave.

In *Blount*, as this Court is aware, the reason that it became so significant that Ms. Blount asked to go to the bathroom because Agent Markonni was saying she was free to leave at anytime. Yet, he contradicted himself because she said she asked to go to the bathroom and he wouldn't let her. We don't have that here.

Agent Anderson has testified he would not let her leave. By virtue of his own testimony she was under arrest.

Now, we have the consent that she [53] allegedly gave to him. And again, to Ms. Mercier, was voluntary consent. She was told—she understood she was not free to go. That's probably very clear to this Court. She was in a private office. She saw the man had to use a key to open the office, she was out of the public view alone with two men she did not know who asked her if they could search her person and her handbag. I indicate to this Court that I think it inherently incredible that she would have said yes to him, just merely on the quote that she gave me. That's why I asked for a quote. I asked, "How would you have asked for her consent?" And he said, "I would like your consent to search your person and your handbag, and you have the right to refuse, if you so desire."

I submit to this Court that the woman who was asked this question by a man who said, yes, that she would permit him, she would give consent to allow him to search, did not understand the question. Those are two agents. If she said, "Yes, I consent to the search—", I suggest to the Court that eleventh grade education or not, she did not understand the question. There never was an indication from this agent that he said, and if you consent, we'll have a woman search you. The woman was not called for until after she said yes. She did not know at the time she said yes, if she said it, that she was consenting—that a woman would come. I suggest to the Court that if there was a consent, it was involuntary. She couldn't [54] possibly have known what she was saying.

So I will not belabor the point. I think, first of all, this was not an investigatory stop. It was an arrest, that this search flowed from an arrest. This woman never understood that she didn't have a right to not consent to the search of her person. It's quite clear that she knew she had narcotics on her. We have to remember when we're looking over this case, this individual, of course, had narcotics on her. There's no way to deny that. So, she knew those narcotics were going to be found. We have to keep that in mind. If she were consenting to a search of her person why didn't she just pull them out and hand them to him. Why did she make them go to—through the whole rigamarole if she was really concealing. Why didn't she just hand him the narcotics, then the search would have been merely a perfunctory search to make sure everything was handed over. It just doesn't make sense, it doesn't hold together. And I submit to the Court this was an arrest, that it was a search incident to an arrest and it was without the Defendant's consent. And that it went far beyond the bounds of *Terry v. Ohio*.

MS. TOENSING: Since we have the burden, just a couple of things.

THE COURT: I will give you two minutes.

MS. TOENSING: All right. I'll take [55] two minutes.

I would like to clear up about the flight conversations that occurred here. I would just like to point out that the

problem that arose was because the Defendant was already ticketed to go to Pittsburgh and had the ticket in her hand, the L.A. to Detroit connection and then Detroit to Pittsburgh connection. With that ticket in her hand, she was going to the ticket counter just to change airlines, not to do anything else. She was not getting a new flight to Pittsburgh. She already had her flight to Pittsburgh. She was just changing airlines. And as the agent testified, he has found, in his experience, that when people carrying illegal drugs think that if anyone is following them and see them leave on a certain airline, they cannot pick them up at the end of the flight.

I think that the agent testified that when he was at the DEA office, according to my recollection, is the time he was not—she was not free to go. And when we talk about being on the concourse and he requested her to go to the DEA office, my point was that he stopped her for what—and he requested her to go to the DEA office for further investigation. At no time did he tell her she was not free to leave. That is what would have to go to the consent.

Quickly, the police officer testified she never had a woman refuse to give consent to a search, and [56] there have been women she has searched that have had drugs on them. I think that's just not a factor whether there was consent or not.

THE COURT: All right.

This has a trial date, does it not?

MS. SIEGAN: I don't think it does, your Honor, because of the adjournment that we had asked for.

THE COURT: You mean to say you have successfully kept this off the trial docket? Well, Ms. Siegan I will tell you frankly, this Court is going to render an opinion on it. And if you are correct that this is an illegal search and the evidence should be suppressed, that is one thing. But if the Government should succeed on this, then I trust you had better be ready for trial Tuesday, because this is long overdue.

Court is adjourned.

SUPREME COURT OF THE UNITED STATES

No. 78-1821

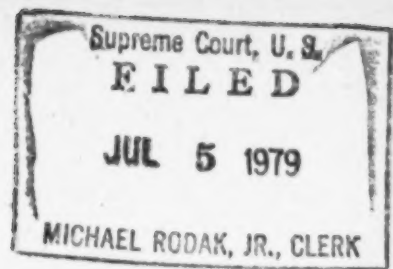
UNITED STATES, PETITIONER

v.

SYLVIA L. MENDENHALL

ORDER ALLOWING CERTIORARI, Filed October 1, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.



**IN THE SUPREME COURT
OF THE
UNITED STATES**

**October Term, 1978
No. 78-1821**

UNITED STATES OF AMERICA,
Petitioner,

-VS-

SYLVIA L. MENDENHALL,
Respondent.

BRIEF IN OPPOSITION

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
REASONS IN OPPOSITION	6
CONCLUSION	15

CITATIONS

Cases:	Page
<i>Brown v. Illinois</i> , 422 U.S. 590 (1975)	6, 13, 14
<i>Bumper v. North Carolina</i> , 391 U.S. 543 (1968)	14
<i>Dunaway v. New York</i> , 47 U.S.L.W. 4635 (U.S. June 5, 1979)	6, 9, 10, 14
<i>Henry v. United States</i> , 361 U.S. 98 (1959)	10
<i>Schneckloth v. Bustamonte</i> , 412 U.S. 218 (1973)	7, 14
<i>Sibron v. New York</i> , 392 U.S. 40 (1968)	10
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	6, 10, 11
<i>United States v. Andrews</i> , No. 78-5165 (6th Cir. June 15, 1979)	8
<i>United States v. Ballard</i> , 573 F.2d 913 (5th Cir. 1978)	6, 7, 8
<i>United States v. Brignoni-Ponce</i> , 422 U.S. 873 (1975)	10, 12
<i>United States v. Camacho</i> , No. 78-5081 (6th Cir. October 18, 1978)	2
<i>United States v. Canales</i> , 572 F.2d 1182 (6th Cir. 1978)	8, 11
<i>United States v. Cortez</i> , 595 F.2d 505 (9th Cir. 1979) .	3, 7
<i>United States v. Craemer</i> , 555 F.2d 594 (6th Cir. 1977) .	8
<i>United States v. Floyd</i> , 418 F. Supp. 1 (E.D. Mich. 1976)	4
<i>United States v. Gill</i> , 555 F.2d 597 (6th Cir. 1977) ...	8
<i>United States v. Hunter</i> , 550 F.2d 1066 (6th Cir. 1977) .	8
<i>United States v. Klein</i> , 592 F.2d 909 (5th Cir. 1979) .	3, 7
<i>United States v. Lewis</i> , 556 F.2d 385 (6th Cir. 1977) .	7, 8
<i>United States v. McCaleb</i> , 552 F.2d 717 (6th Cir. 1977) .	7-12
<i>United States v. Oates</i> , 560 F.2d 45 (2nd Cir. 1977) .	6, 7
<i>United States v. Pope</i> , 561 F.2d 663 (6th Cir. 1977) .	8
<i>United States v. Rico</i> , 594 F.2d 320 (2nd Cir. 1979) .	7
<i>United States v. Rogers</i> , 436 F. Supp. 1 (E.D. Mich. 1976)	4
<i>United States v. Smith</i> , 547 F.2d 882 (6th Cir. 1978) .	8
<i>Wong Sun v. United States</i> , 371 U.S. 471 (1963) ...	6, 14

Sylvia Mendenhall, through her counsel, submits that this court should deny the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the en banc court of appeals (Petitioners App. A, 1a-7a) is not yet reported. The opinion of the Panel (Pet. App. B, 8a) and the opinion of the district court (Pet. App. C, 9a-20a) are not reported.

JURISDICTION

The judgment of the en banc court of appeals was entered on April 6, 1979. The government was granted an extension of time in which to file their Petition for Certiorari until June 5, 1979. Jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether an arrest occurred where there is no claim of probable cause by the government and where defendant was seized by federal agents in a room within a private, locked DEA office in an airport for the purpose of obtaining a search of defendant.

(2) Whether the court of appeals properly refused to uphold an investigatory stop where federal agents knew only that defendant 1) was on a flight from Los Angeles to Detroit, 2) was the last passenger to deplane, and 3) upon deplaning the defendant appeared nervous to the federal agent and looked around the area where agents were standing.

(3) Whether a search must fail where the consent is obtained within minutes of an illegal stop and an illegal arrest

and there is no intervening factor of significance to dissipate the taint of the illegal stop and illegal arrest.

STATEMENT OF THE CASE

(1) Sylvia Mendenhall was indicted in the United States District Court for the Eastern District of Michigan for possession of heroin with intent to distribute it in violation of 21 U.S.C. 841(a) (1). Defendant filed a motion to suppress evidence which was denied by the district court. Sylvia Mendenhall was convicted as charged in a non-jury trial on stipulated facts. Sylvia Mendenhall was sentenced on January 20, 1978 to 18 months in prison with a special parole term of three years to follow. Bond was cancelled.

The direct appeal followed reversing the judgment of the district court and suppressing the evidence in an unpublished per curiam opinion. En banc review in this case and *U.S. v Camacho*, No. 78-5081 (6th Cir. October 18, 1978) reinstated the panel decision.

Neither the court of appeals panel nor the Sixth Circuit en banc decided defendant's issue as to whether the case should be remanded to the district court to re-open the evidentiary hearing since defendant did not voluntarily relinquish her right to be present at the hearing on the motion to suppress evidence. This is due to the fact that the court of appeals ruled that seizure and search of Sylvia Mendenhall failed to pass constitutional muster. The circumstances of this issue are set forth in point four, *infra*, of this statement of the case.

(2) Although the government does not claim probable cause, the arrest in this case is sought to be justified on the basis of an alleged airport drug courier profile developed by federal agents. Following Supreme Court law the courts of appeals have refused to grant carte blanche permission to search based on the profile's amorphous aggregation of characteristics of individuals. The courts of appeals have insisted that each case be judged on its record. Petitioner

apparently seeks to eliminate the case-by-case approach by setting up a class of cases in which searches will automatically be permissible.¹ The courts of appeals have uniformly rejected this novel approach to stopping citizens and have insisted on an articulable suspicion or probable cause to arrest.

(3) Sylvia Mendenhall was stopped by federal agents at Detroit Metropolitan Airport as she was proceeding down the concourse to board a flight to Pittsburgh. (Tr. 14) The agents had no prior information about the Defendant, nor, apparently, any information suggesting that an incident of drug-trafficking was to occur. (Tr. 25)

At the time of the stop, the agents had seen the defendant "satisfy" three characteristics of the "drug courier profile." She had (1) arrived on a flight from Los Angeles (Tr. 10); (2) been the last person to exit the aircraft (Tr. 11);² and, (3) appeared nervous to the agents while glancing around the deplaning area. (Tr. 19)

Two other factors that came to the agents attention evaporated prior to the stop in this case: (1) the significance of claiming no baggage evaporated when the agents discovered that the defendant was in the process of changing airlines and it would be more unusual for a person to transfer their own luggage (Tr. 21-22); (2) the significance of transfer-

¹ Petitioner relies on cases regarding airport searches to prevent air piracy. Pet. 18, n. 17. Of course, the number of "profiles" could be increased to allow federal agents to search anyone at any time. Recently the Ninth Circuit Court of Appeals has rejected random searches by use of an "alien courier profile." *United States v. Cortez*, 595 F.2d 505 (9th Cir. 1979). Likewise, the Fifth Circuit Court of Appeals has held that resemblance to a "smuggling profile" does not determine the constitutional validity of a search since that depends on the facts in each case. *United States v. Klein*, 592 F.2d 909 (5th Cir. 1979).

² Although the Petitioner asserts that "deplaning last" is a characteristic of the "drug courier profile," Pet. 3, n.2, this factor does not appear in any of the reported cases.

ing airlines³ evaporated since the agent did not know if any nonstop flights were available from Los Angeles to Pittsburgh nor was he aware of when an American Airlines flight would go to Pittsburgh from Detroit. (Tr. 13) (The defendant had arrived from Los Angeles on an American Airlines flight and was continuing to Pittsburgh on an Eastern Airlines flight.) (Tr. 10, 13)

Following questioning in the concourse, the defendant was asked to accompany the agents to the DEA office. (Tr. 15) She was not told that she was free to leave, and, in fact, would have been stopped had she attempted to walk away. (Tr. 16)

The DEA office located at the airport is private and locked. The defendant was taken to a room within this office. (Tr. 27) DEA agent Thomas Anderson asked the defendant if he could search her person as well as her handbag. The agent testified that he stated to the defendant that she had the right to decline if she so desired and that she responded, "Go ahead." (Tr. 15-16)

Following a search of the defendant's purse, Beverly Mercier, a female police officer, arrived at the DEA office and accompanied the defendant to a separate room. (Tr. 17) Officer Mercier had previously searched a number of women, including approximately ten for narcotics. She had never had a woman refuse consent for the search. (Tr. 36-37) According to Officer Mercier, the defendant was asked if she consented to the search and she replied that she did. Officer Mercier then told the defendant that "It's a strip search. That means everything goes off." (Tr. 34)

At this point the defendant told the officer that she had a plane to catch. Officer Mercier told the defendant that if she

³ The "transfer of airlines" characteristic, does not appear to have been relied on by the government in any other "profile" cases. In fact, it appears to conflict with testimony given by DEA agents in other cases that the profile includes taking *direct* flights from specified cities. See *United States v. Floyd*, 418 F. Supp. 724, 725 (E.D. Mich. 1976); *United States v. Rogers*, 436 F. Supp. 1, 3 (E.D. Mich. 1976).

didn't have anything on her she didn't have a problem. (Tr. 34) Although she kept repeating that she had a plane to catch, the defendant began to undress under the direction of Officer Mercier. (Tr. 34, 37) After the defendant had taken her blouse off, she pulled a package out of her brassiere which was handed to the officer. (Tr. 34) The defendant then took off her skirt, pantyhose, slip and panties. She then handed the officer another package which had been inside her panties. (Tr. 35) The packages were found to contain heroin. (Tr. 17)

If the defendant had attempted to leave the DEA office prior to being searched she would have been stopped. (Tr. 29)

(4) The defendant failed to appear for the evidentiary hearing in this matter. Over objections by her counsel the court proceeded in her absence.

Following the defendant's arrest, defense counsel moved for rehearing so that defendant could present evidence relevant to her arrest and alleged consent to search. This was denied.

The defendant was charged, by Indictment, with bond jumping as a result of her failure to appear at the evidentiary hearing in the instant case. (E.D. Mich. Cr. No. 7-81109) Following a bench trial she was acquitted of this charge.

REASONS IN OPPOSITION

This case presents issues of law well settled in our jurisprudence. Most obviously, the conclusion is clear that a seized person has been placed under arrest when that person has been taken from a public area to a locked, private, federal agent interrogation office for the purpose of obtaining a search of that person. The law as to the point of arrest was recently reaffirmed in *Dunaway v New York*, 47 U.S.L.W. 4635 (U.S. June 5, 1979)

The clarity of the arrest issue is dispositive of the entire matter for the government does not claim probable cause to arrest.

It is equally well settled that reasonable suspicion under *Terry v Ohio*, 392 U.S. 1 (1968) and its progeny cannot be manufactured from the fact that (1) a person has completed an airplane flight from Los Angeles to Detroit, (2) that a person is the last person to get off the airplane and (3) that the person appears nervous to federal agents while looking about the deplaning area. There are no cases upholding investigatory stops based on facts like this. See, e.g., *United States v Ballard*, 573 F.2d 913 (5th Cir. 1978).⁴

Sylvia Mendenhall's consent to a strip search followed within minutes of the illegal stop and arrest. There was no intervening factor of any significance to break the connection between the unconstitutional seizures of her person and the giving of her consent. Rather, the consent was clearly the product of the illegal actions. The decisions in *Wong Sun v. United States*, 371 U.S. 471 (1963); *Brown v. Illinois*, 422 U.S. 590 (1975); and *Dunaway v. New York*, 47 U.S.L.W. 4635 (U.S. June 5, 1979) are dispositive of the government's claim that the tainted consent can support the search.

⁴ Certainly the officers could have continued their investigation by getting Ms. Mendenhall's ticket history from the airlines, by calling Pittsburgh to observe her upon arrival there or observing her on the flight to Pittsburgh as was done in *United States v. Oates*, 560 F.2d 45 (2nd Cir. 1977).

Moreover, even apart from the illegalities that produced the consent, the government failed to meet its burden of establishing that the defendant's consent was freely and voluntarily given under the "totality of the circumstances" test announced in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

The drug courier profile itself is a rather loosely formulated list of characteristics used by Detroit DEA agents to indicate "suspicious persons." All the courts of appeals that have analyzed this courier profile agree that the courier profile is an insufficient basis on which to justify an investigative stop.⁵ *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978); *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977); *United States v. Rico*, 594 F.2d 320 (2nd Cir. 1979). See also, *United States v. Cortez*, 595 F.2d 505 (9th Cir. 1979); *United States v. Klein*, 592 F.2d 909 (5th Cir. 1979).

Decisions that Petitioner relies upon for a conflict in law among the courts of appeals are cases where searches have been upheld in factual situations that would also have been legal searches in the Sixth Circuit. *United States v. Oates*, 560 F.2d 45 (2nd Cir. 1977), a leading case, is heavily relied upon by Petitioner. In *Oates*, similar to *United States v. Lewis*, 556 F.2d 385 (6th Cir. 1977), but unlike *McCaleb* and the present case, *Oates'* name and face were familiar to detectives as a known narcotics dealer, and, inter alia, there were "highly suspicious" bulges in a companion's clothing. Of course, the searches in both *Oates* and *Lewis* were upheld.

⁵ The prosecution has urged statistical success with the profile. Their figures are very misleading:

1. Absolutely no records were kept as to how many consent searches took place where no contraband was found. (S. App. 3,4)
2. It is impossible to determine how many successful searches resulted from use of the profile alone—an unspecified number of searches involved both the profile and either an informant's tip or some other unspecified type of independent corroboration. (S. App. 20)

("S. App." references are to the supplemental appendix filed with the Supplemental Brief for Appellant for the en banc hearing in this case.)

The Fifth Circuit Court of Appeals has published an opinion on facts similar to those at hand, reaching the same obvious result. In *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978) the court held:

Because as discussed above, we give little weight to the amount of luggage carried by Ballard, and the suspicion that he arrived from Los Angeles, Ballard's supposed nervousness and his walking pace are the only substantial factors offered to justify the search, and we would be most reluctant to hold that the police can stop anyone exhibiting only those two characteristics. We conclude that Officer Donald did not have reasonable suspicion to stop Ballard and that, therefore, the stop was in violation of the fourth amendment. (573 F.2d at 916)

Petitioner has cited other decisions where the searches at airports have been upheld. In each case cited there was more information articulated by the agent to create a reasonable suspicion than the information present in this case. Literally dozens of stops and searches at Detroit Metropolitan Airport have been upheld by the Sixth Circuit Court of Appeals, but, of course, in each case there was more information articulated by the agent to create a reasonable suspicion than those set forth in this case.⁶

⁶ Reported decisions upholding searches include: *United States v. Lewis*, 556 F.2d 385 (6th Cir. 1977), cert. denied 98 S. Ct. 722 (1978); *United States v. Canales*, 572 F.2d 1182 (6th Cir. 1978); *United States v. Pope*, 561 F.2d 663 (6th Cir. 1977); *United States v. Smith*, 574 F.2d 882 (6th Cir. 1978); *United States v. Gill*, 555 F.2d 597 (6th Cir. 1977); *United States v. Andrews*, No. 78-5165 (6th Cir. June 15, 1979). Reported decisions refusing to uphold searches include: *United States v. Craemer*, 555 F.2d 594 (6th Cir. 1977); *United States v. Hunter*, 550 F.2d 1066 (6th Cir. 1977); *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977).

1. Whether An Arrest Occurred Where There Is No Claim Of Probable Cause By The Government And Where Defendant Was Seized By Federal Agents In A Room Within A Private, Locked, DEA Office In An Airport For The Purpose Of Obtaining A Search Of Defendant.

Petitioner misreads *United States v. McCaleb, supra*, in stating that "asking" a suspect to accompany an agent plus the fact that a suspect is not free to leave at that point constitutes arrest. Petitioner then proceeds to devote his brief to attempting to destroy the strawman he has created.

McCaleb notes that defendants in that case were not free to leave at any point after the initial stop by federal agents, but finds the arrest to be complete when the citizen has been sequestered in a private police office, "when appellants were taken to the private office and were not free to leave, the arrest was clearly complete." 552 F. 2d at 720. The law of arrest is well settled as to the clear circumstances presented here and the holdings in *McCaleb* and the en banc decision in this case reflect that rule of law.

This standard of arrest was most recently affirmed in *Dunaway v. New York*, 47 U.S.L.W. 4635 (U.S. June 5, 1979):

[T]hat detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest. We accordingly hold that the Rochester Police violated the Fourth and Fourteenth Amendments when, without probable cause, they seized Petitioner and transported him to the police station for interrogation.

In *Dunaway*, like here, the Petitioner was totally restrained. The facts here are indistinguishable from a traditional arrest. Defendant was not merely questioned briefly where she was found. Instead she was taken from the public area to the federal agents' private, closed and locked interro-

gation room in the airport. Defendant was never informed she was "free to go," indeed, she would have been physically restrained if she had refused to accompany the officers or had tried to escape their custody. The facts here are indistinguishable from those in *Dunaway*.

Freedom of movement has long been identified as a controlling factor in determining the time of arrest. *Henry v. United States*, 361 U.S. 98, at 103 (1959). In *Sibron v. New York*, 392 U.S. 40 (1968) the Court held that "looking for narcotics" was not a permissible reason for justifying a *Terry* stop and subsequent search.

Secondly, Petitioner misreads *McCaleb* as basing the finding of arrest on the subjective intent of the federal agents. What the Petitioner fails, or refuses, to perceive is that a reasonable person in the position of Sylvia Mendenhall or the defendant in *McCaleb* could only believe that they were not free to leave. The agents' testimony merely confirms the objective facts and circumstances that would lead any reasonable person in Ms. Mendenhall's position to believe that she was not free to leave. *Dunaway* reaffirms the fact that this area of the law is well-settled.

United States v. Brignoni-Ponce, 422 U.S. 873 (1975), describes the permissible intrusion as "modest." Investigative stops usually consumed less than a minute and involved "a brief question or two." *Id.* at 880.

Sylvia Mendenhall's seizure bears no resemblance to the modest, narrowly defined intrusion involved in *Terry* and its progeny. The record and opinion here is in complete conformity with legal precedent compelling a legal as well as common sense conclusion that an arrest has occurred.

2. Whether the Court of Appeals Properly Refused To Uphold an Investigatory Stop Where Federal Agents Knew Only That Defendant (1) Was On A Flight From Los Angeles To Detroit, (2) Was The Last Passenger To Deplane, And (3) Upon Deplaning The Defendant Appeared Nervous To The Federal Agent And Looked Around The Area Where Agents Were Standing.

Petitioner misread *McCaleb* in that his first "question presented" indicated the court of appeals has held that it will never find reasonable suspicion for an investigative stop when observed behaviour could be said to be consistent with innocent behavior. Actually, *McCaleb*, which was reaffirmed in the en banc decision in this case, recognized that each case must be evaluated on its facts in order to determine whether there is any real tie-in with suspected criminal activity:

While a set of facts may arise in which the existence of certain profile characteristics constitutes reasonable suspicion, the circumstances of this case do not provide "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warranted" the intrusion of an investigatory stop. *Terry v. Ohio, supra*, 392 U.S. at 21.

United States v. McCaleb, 552 F.2d at 720.

Despite Petitioner's claim, consistency with innocent behavior has not been made a "standard."

McCaleb and its progeny correctly implement the recognition in *Terry* that even this type of "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat" constitute a "serious intrusion upon the sanctity of the person which may inflict great indignity and arouse strong resentment." 392 U.S. at 20, 17.

In *United States v. Canales*, 572 F.2d 1182 (6th Cir. 1978), the *McCaleb* standard was correctly employed to uphold an investigative stop and subsequent conviction. Var-

ious factors of the courier profile were present plus the fact that Canales' car had been seen at the home of a narcotics trafficker, and that Canales had been observed in sections in Mexico near sites of known narcotics trafficking. Although Canales conduct certainly was hypothetically consistent with innocent behavior, the Sixth Circuit found that there was in fact a real tie-in with suspected crime and a reason to stop Canales.

Secondly, Petitioner is mistaken in stating that "the Court seems to regard reliance by the agents on these characteristics in initiating an encounter as largely irrelevant and possibly improper." Pet. 16.

McCaleb correctly recognizes that sets of facts will arise in which the existence of certain profile characteristics constitutes reasonable suspicion. The en banc decision here states: "That the drug enforcement agency employment of this profile in educating as to what conduct to look for in relation to drug couriers is a perfectly valid law enforcement device." Pet. App. 2a. However, the court of appeals has refused to find that the term "courier profile" is a talisman allowing search by judicial fiat.

The decisions below are consistent with *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) which holds that "in all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling," 422 U.S. at 885, but that "even though the intrusion and incident to a stop is modest, we conclude that it is not 'reasonable' under the Fourth Amendment to make such stops on a random basis." 422 U.S. at 883. The Court recognized the difference between a relevant factor and sufficient information to allow an investigative stop:

Large numbers of native born and naturalized citizens have the physical characteristics identified with Mexican ancestry; even in the border area a relatively small proportion of them are aliens. The likelihood that any given person of Mexican ancestry is an alien

is high enough to make Mexican appearance a factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens. 422 U.S. at 887.

Here perhaps the only three remaining factors: (1) being on a flight from Los Angeles to Detroit, (2) being the last person to get off the plane, and (3) glancing about the deplaning area in a manner which is viewed as nervous by the federal agents were relevant in light of the federal agents' experience, but certainly not sufficient to provide reasonable suspicion to stop a citizen.

3. Whether A Search Must Fail Where The Consent Is Obtained Within Minutes Of An Illegal Stop And An Illegal Arrest And There Is No Intervening Factor Of Significance To Dissipate The Taint Of The Illegal Stop And Illegal Arrest.

The consent to search given by the defendant came within minutes of her having been stopped without reasonable suspicion and arrested without probable cause. There was no intervening factor of any significance to dissipate the taint of the illegal stop and arrest.

The government has framed this issue as being: "Whether a suspect who is being illegally detained can validly consent to a search." Pet. 2. It is undisputed that a valid consent *can* follow an illegal arrest—if it was not obtained through exploitation of the illegality. Here, however, the consent was the direct product of the illegal stop and arrest.

In *Brown v. Illinois*, 422 U.S. 590 (1975) a confession was obtained following an arrest without probable cause. Finding the relevant inquiry to be "whether Brown's statements were obtained by exploitation of the illegality of his arrest," *id.* at 600, the Court held that there was "no intervening event of significance whatsoever," *id.* at 605, despite the giving of *Miranda* warnings and a lapse of two hours from the illegal arrest before the incriminating state-

ment was made. The same result was recently reached under similar facts in *Dunaway v. New York*, 47 U.S.L.W. 4635 (U.S. June 5, 1979). See also, *Wong Sun v. United States*, 371 U.S. 471 (1963).

The consent to a strip search given by the defendant here, like the incriminating statements made by defendants in *Brown v. Illinois*, *supra*, and *Dunaway v. New York*, *supra*, was obtained by the exploitation of the illegal arrest. The court of appeals correctly held that the consent was not valid.

The consent relied upon to support the search here was invalid even aside from the illegalities which preceded it. The 22-year-old defendant had been ushered into the private, locked office of the DEA by two federal agents. Although the defendant was told that she did not have to consent to the search she had no reason to believe that she would be released if consent was refused or that the agents would not forcibly search her if she refused consent. The defendant continued to protest that she had a plane to catch even as the strip search commenced. The government clearly failed to establish that the consent was freely and voluntarily given.⁷ See, e.g., *Bumper v. North Carolina*, 391 U.S. 543 (1968); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

⁷ The inherently coercive nature of the setting in which this "consent" was obtained was underscored by the testimony of the female officer who conducted the search. She testified to having previously searched a number of women, including approximately 10 for narcotics. She had never had a woman refuse consent for the search.

CONCLUSION

The petition for Writ of Certiorari should be denied.

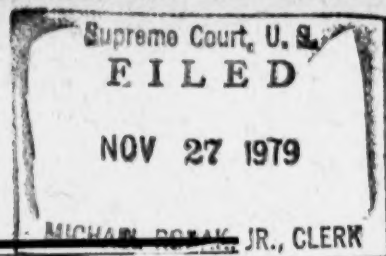
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No. 78-1821



In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

SYLVIA L. MENDENHALL

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Summary of Argument	12
Argument	18
I. Respondent was not illegally seized when federal narcotics agents ap- proached and questioned her in the air- port concourse	19
A. Respondent was not "seized" with- in the meaning of the Fourth Amendment when the agents ap- proached her and requested to see her identification and airline ticket	19
B. Even if the initial encounter with respondent constituted a Fourth Amendment seizure of her person, it was justified by reasonable sus- picion of criminal activity	26
II. Respondent's Fourth Amendment rights were not violated when she and the agents went from the airport concourse to the nearby DEA office	42

II

Argument—Continued

Page

A. Respondent's voluntary consent to move to the DEA office obviates any Fourth Amendment objection that might otherwise be available..	43
B. The Sixth Circuit's standard for determining whether an arrest has occurred is incorrect	47
1. Whether there has been an arrest requiring probable cause does not necessarily depend on whether a detained individual is free to leave	48
2. Moving an individual from the location of a Terry stop to a nearby office does not necessarily effect an arrest	50
C. Moving respondent to a nearby office was reasonable in the circumstances of this case	52
III. Respondent effectively consented to the search of her person, regardless of the legality of her detention	62
A. Respondent's consent was voluntary	63
B. Respondent's consent is not invalid as a "fruit" of an illegal detention	65
Conclusion	74

III

CITATIONS

Cases:	Page
<i>Adams v. Williams</i> , 407 U.S. 143	20, 27, 28, 51
<i>Almeida-Sanchez v. United States</i> , 413 U.S. 266	63
<i>Beck v. Ohio</i> , 379 U.S. 89	28
<i>Bretti v. Wainwright</i> , 439 F.2d 1042, cert. denied, 404 U.S. 943	70
<i>Brown v. Illinois</i> , 422 U.S. 590	17, 63, 66, 67, 69-70
<i>Brown v. Texas</i> , No. 77-6673 (June 25, 1979)	14, 24, 35, 39, 48, 70
<i>Camara v. Municipal Court</i> , 387 U.S. 523..	27
<i>Coates v. United States</i> , 413 F.2d 371.....	2, 23
<i>Davis v. Mississippi</i> , 394 U.S. 721	20
<i>Delaware v. Prouse</i> , No. 77-1571 (March 27, 1979)	27
<i>Dunaway v. New York</i> , No. 78-5066 (June 5, 1979)	39, 46, 47, 53, 58, 60, 68, 71
<i>Holland v. United States</i> , 348 U.S. 121	28
<i>Husted v. State</i> , No. 78-1830 (Fla. May 8, 1979)	3
<i>Lowe v. United States</i> , 407 F.2d 1391	23
<i>Miranda v. Arizona</i> , 384 U.S. 436	20
<i>Pennsylvania v. Mimms</i> , 434 U.S. 106..	16, 39, 51, 52, 53, 54
<i>People v. Clifford</i> , 2d Crim. No. 33085 (Cal. App. March 16, 1979)	3, 25
<i>People v. Dunaway</i> , 61 App. Div. 2d 299, 402 N.Y.S. 2d 490	59, 60
<i>People v. Stevens</i> , 183 Colo. 399, 517 P.2d 1336	61
<i>Phelper v. Decker</i> , 401 F.2d 232	70
<i>Schneckloth v. Bustamonte</i> , 412 U.S. 218..	45, 62, 64, 71

IV

Cases—Continued

Page

<i>Scott v. United States</i> , 436 U.S. 128	15, 23, 46
<i>Sibron v. New York</i> , 392 U.S. 41	20
<i>State v. Becerra</i> , 111 Ariz. 538, 534 P.2d 743	34
<i>State v. Ochoa</i> , 112 Ariz. 582, 544 P.2d 1097	33
<i>State v. Reid</i> , No. 57466 (Ga. App. April 4, 1979)	3
<i>Terry v. Ohio</i> , 392 U.S. 1	<i>passim</i>
<i>United States v. Afanador</i> , 567 F.2d 1325	29
<i>United States v. Asbury</i> , 586 F.2d 973	34
<i>United States v. Ballard</i> , 573 F.2d 913	3, 35
<i>United States v. Bazinet</i> , 462 F.2d 982, cert. denied, 409 U.S. 1010	10
<i>United States v. Bell</i> , 464 F.2d 667, cert. denied, 409 U.S. 991	34
<i>United States v. Brignoni-Ponce</i> , 422 U.S. 873	8, 14, 15, 27, 36, 37, 39
<i>United States v. Brunson</i> , 549 F.2d 348, cert. denied, 434 U.S. 842	25-26
<i>United States v. Camacho</i> , No. 78-5081 (October 18, 1978)	3, 11, 55
<i>United States v. Canales</i> , 572 F.2d 1182..	44
<i>United States v. Carrizosa-Gaxiola</i> , 523 F.2d 239	34
<i>United States v. Chatman</i> , 573 F.2d 565..	3, 56, 61
<i>United States v. Crews</i> , 389 A.2d 277, cert. granted, No. 78-777 (argued October 31, 1979)	72
<i>United States v. Cyzewski</i> , 484 F.2d 509, cert. dismissed, 415 U.S. 902	34
<i>United States v. Elmore</i> , 595 F.2d 1036, petition for cert. pending, No. 78-6884..	3, 25, 48

Cases—Continued

Page

<i>United States v. Fike</i> , 449 F.2d 191	70
<i>United States v. Forbicetta</i> , 484 F.2d 645..	34
<i>United States v. Garcia</i> , 496 F.2d 670, cert. denied, 420 U.S. 960	73
<i>United States v. Grandi</i> , 424 F.2d 399	23
<i>United States v. Hall</i> , 525 F.2d 857	37
<i>United States v. Holland</i> , 510 F.2d 453, cert. denied, 422 U.S. 1010	28
<i>United States v. Kallevig</i> , 534 F.2d 411....	34
<i>United States v. Lee</i> , 372 F. Supp. 591....	51
<i>United States v. Lemon</i> , 550 F.2d 467	73
<i>United States v. Lopez</i> , 328 F. Supp. 1077	34
<i>United States v. Magda</i> , 547 F.2d 756, cert. denied, 434 U.S. 878	41
<i>United States v. Martinez-Fuerte</i> , 428 U.S. 543	51
<i>United States v. McCaleb</i> , 552 F.2d 717....	<i>passim</i>
<i>United States v. Nieves</i> , 79-1051 (2d Cir. October 30, 1979)	40, 61
<i>United States v. Oates</i> , 560 F.2d 45.....	23, 41, 56, 61
<i>United States v. O'Looney</i> , 544 F.2d 385, cert. denied, 429 U.S. 1023	61
<i>United States v. Pope</i> , 561 F.2d 663	3
<i>United States v. Price</i> , 599 F.2d 494	3, 25, 27, 37, 48
<i>United States v. Purry</i> , 545 F.2d 217	51
<i>United States v. Race</i> , 529 F.2d 12	70
<i>United States v. Richards</i> , 500 F.2d 1025..	51
<i>United States v. Rico</i> , 594 F.2d 320	3
<i>United States v. Ruiz-Estrella</i> , 481 F.2d 723	70
<i>United States v. Salter</i> , 521 F.2d 1326	61

VI

Cases—Continued

Page

<i>United States v. Santana</i> , 485 F.2d 365, cert. denied, 415 U.S. 931	41
<i>United States v. Short</i> , 570 F.2d 1051	61
<i>United States v. Smith</i> , 574 F.2d 882.....	44, 56
<i>United States v. Thompson</i> , 558 F.2d 552..	51
<i>United States v. Troutman</i> , 590 F.2d 604..	3, 70
<i>United States v. Van Lewis</i> , 409 F. Supp. 535, aff'd, 556 F.2d 385	3, 4, 32, 35, 56, 65
<i>United States v. Vasquez-Santiago</i> , Nos. 78-1418, 78-1419 (2d Cir. July 12, 1979)	64, 70
<i>United States v. Watson</i> , 423 U.S. 411	64
<i>United States v. Worthington</i> , 544 F.2d 1275	51
<i>United States v. Wylie</i> , 569 F.2d 62, cert. denied, 435 U.S. 944	22, 23, 48, 57, 61
<i>Williams v. United States</i> , 381 F.2d 20....	23
<i>Wong Sun v. United States</i> , 371 U.S. 471..	65

Constitution and statute:

United States Constitution:

Fourth Amendment	<i>passim</i>
Fifth Amendment	17, 67
21 U.S.C. 841(a)(1)	5

Miscellaneous:

ALI, <i>Model Code of Pre-Arrest Procedure</i> (Proposed Official Draft 1975) ..	21, 51, 57, 60
W. LaFare, <i>Search and Seizure, A Treatise on the Fourth Amendment</i> (1978) ..	21, 25, 50, 72
W. Seymour, <i>The Young Die Quietly: The Narcotics Problem in America</i> (1972) ..	40

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1821

UNITED STATES OF AMERICA, PETITIONER

v.

SYLVIA L. MENDENHALL

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT*

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-7a) is reported at 596 F.2d 706. The opinion of the panel (Pet. App. 8a) and the opinion of the district court (Pet. App. 9a-20a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1979. On April 27, 1979, Mr. Justice

Stewart extended the time within which to file a petition for a writ of certiorari to June 5, 1979. The petition for a writ of certiorari was filed on that date and was granted on October 1, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether respondent was illegally seized when federal agents approached her and asked her for identification.

2. Whether respondent's Fourth Amendment rights were violated when she accompanied the agents from the airline terminal concourse to a nearby office for further questioning.

3. Whether a suspect who is being illegally detained can validly consent to a search.

STATEMENT

1. Since 1974, the Drug Enforcement Administration has developed an extensive airport surveillance program designed to intercept domestic couriers transporting narcotics between major drug source and distribution centers in the United States. The program was primarily initiated and developed by DEA agents assigned to Detroit, Seattle and La Guardia Airports, and now operates at more than 25 airports throughout the nation. This program is an important part of DEA's total drug enforcement effort. Airport enforcement provides a unique opportunity to intercept large quantities of high-grade

drug shipments at a point in the distribution chain well above that reached by the traditional under-cover-buy approach to drug law enforcement.

The program has resulted in the interception of substantial quantities of illicit drugs¹ and has also generated a corresponding abundance of litigation in both federal and state appellate courts.² Many domestic courier cases are made through on-going in-

¹ The operation and success of the Detroit airport program is most fully described in the opinion of the district court in *United States v. Van Lewis*, 409 F. Supp. 535 (E.D. Mich. 1976), aff'd, 556 F.2d 385 (6th Cir. 1977), based on evidence adduced at an extensive suppression hearing. Further data demonstrating the high success rate of the program was developed in the suppression hearing in *United States v. Camacho*, which was considered by the en banc court together with this case. This evidence was presented to the court of appeals in our petition for rehearing in this case and *Camacho* (C.A. App. 44-46). In 1976 alone, 66 pounds of heroin were seized at the Detroit Airport. Some of these statistics are set forth in greater detail in Judge Weick's dissent (Pet. App. 4a n.1).

² For some of the recent cases considering suppression motions arising out of the operation of the program, see *United States v. Price*, 599 F.2d 494 (2d Cir. 1979); *United States v. Rico*, 594 F.2d 320 (2d Cir. 1979); *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979), petition for cert. pending, No. 78-6884; *United States v. Troutman*, 590 F.2d 604 (5th Cir. 1979); *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978); *United States v. Pope*, 561 F.2d 663 (6th Cir. 1977); *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977); *United States v. Chatman*, 573 F.2d 565 (9th Cir. 1977); *People v. Clifford*, 2d Crim. No. 33085 (Cal. App. March 16, 1979); *Husted v. State*, No. 78-1830 (Fla. May 8, 1979); *State v. Reid*, No. 57466 (Ga. App. April 4, 1979), petition for cert. pending, No. 79-448.

vestigations or tips from other units that focus on an individual passenger. Many other cases, however, are made without the benefit of prior information. Trained and experienced agents observe arriving and departing passengers on certain flights for characteristics and behavioral traits that, on the basis of their collective experience, have tended to distinguish drug couriers from ordinary passengers.³

The DEA and its agents in the field have also developed relatively standard procedures for approaching and questioning individuals suspected of being drug couriers.⁴ These procedures generally involve: (1) an initial contact with the suspect to check his identification and ticket; (2) a request that the suspect move from the public areas of the terminal to a nearby office if the agents believe that further questioning is appropriate; and (3) a request in the office for consent to search the suspect's effects or person. This case represents a fairly typical example of the operation of the airport surveillance program and of the legal questions that it has generated.

2. Following a non-jury trial on stipulated facts in the United States District Court for the Eastern

³ These traits and characteristics, sometimes referred to as a "drug courier profile," include such elements as round trips of short duration between major drug centers, purchasing tickets with cash, little or no baggage, changing airlines during the trip, using an alias, and, in general, nervous or unusual behavior. See *United States v. Van Lewis*, *supra*, 409 F. Supp. at 538; A. 8.

⁴ The DEA is in the process of preparing official policy guidelines for use by DEA airport details.

District of Michigan, respondent was convicted of possession of heroin with intent to distribute it in violation of 21 U.S.C. 841(a)(1).⁵

The evidence at a pretrial suppression hearing showed that early on the morning of February 10, 1976, two DEA agents stationed at the Detroit Metropolitan Airport were observing passengers deplaning from an American Airlines flight from Los Angeles. Los Angeles was known to the agents as a major source of narcotics (A. 9, 15). Agent Anderson's attention was drawn to respondent, who was the last person to leave the airplane. In his experience, encompassing 10 years with DEA and participation in approximately 100 arrests during his assignment to the Detroit Airport (A. 7; Pet. App. 13a-14a), drug couriers tend to deplane last, particularly on early morning flights, so that they can more easily detect agents who might be watching them (A. 9).

Anderson testified that respondent "completely scanned the whole area where we were standing" and "appeared to be very nervous" as she came off the airplane (A. 9, 14). Respondent proceeded past the baggage claim area but claimed no luggage—a fact that the agents had found to be another common characteristic of drug couriers (A. 8, 10). Respondent instead went to the Eastern Airlines ticket counter (A. 10). Agent Anderson stood in line directly behind her at the counter and watched as she took her

⁵ Respondent was sentenced to a term of 18 months' imprisonment, to be followed by a three-year special parole term.

ticket from her purse. He was able to observe the ticket as she held it in her hand; it was an American Airlines ticket marked for travel from Los Angeles through Detroit to Pittsburgh (*ibid.*). Respondent sought to change her ticket from American to Eastern, keeping Pittsburgh as her destination (*ibid.*); this was significant to the agent because couriers frequently change airlines and flight times to evade surveillance and detection (A. 10-11).

Respondent then left the ticket counter and headed for the Eastern flight departure gate (A. 11). The agents approached her on the concourse, identified themselves as federal agents, and asked to see her identification and airline ticket (*ibid.*). Respondent produced her driver's license, which was in the name of Sylvia Mendenhall. Her ticket, however, was issued in the name of "Annette Ford." When asked why the ticket was under a different name, respondent stated that she "just felt like using that name" (*ibid.*). The agents' suspicions were heightened when respondent stated that she had remained in California only two days, which seemed an unusually brief period for a journey of that distance (*ibid.*). Agent Anderson then specifically identified himself as a federal narcotics officer, and respondent "became quite shaken, extremely nervous. She had a hard time speaking" (A. 11-12).⁶

Agent Anderson then asked respondent if she would accompany him to the DEA office for further ques-

⁶ The entire conversation in the concourse lasted only two or three minutes (A. 12).

tions, and she agreed (A. 12). The office is a short walk up a flight of stairs and is located about 50 feet from where respondent was approached (A. 19). The office consists of a reception area with three other rooms branching off from that area (A. 20-21). At the office, the agent asked her if she would mind allowing a search of her person and handbag and told her that she had the right to decline the search if she so desired. She responded, "Go ahead" (A. 12). She then handed Agent Anderson her purse, which contained a different airline ticket that had been issued to "F. Bush" three days earlier for a flight from Pittsburgh through Chicago to Los Angeles (*ibid.*). Respondent admitted that this was the ticket on which she had flown to California but gave no reason for using that additional alias (*ibid.*).

A female police officer then arrived to search respondent's person (A. 12-13). She asked the agents if respondent had consented to be searched (A. 24). The agents said that she had, and respondent followed the policewoman into a private room. There the policewoman again asked respondent if she consented to the search, and respondent replied that she did (*ibid.*). The policewoman explained that the search would require the removal of respondent's clothing. Respondent stated that she had a plane to catch and was assured by the policewoman that if she had nothing on her, there would be no problem (*ibid.*). Respondent then began to disrobe without further comment (*ibid.*). As respondent removed her clothing, she took a plastic package from her bra,

which appeared to contain heroin, and another package, wrapped in brown paper, from her underpants, and handed both to the policewoman (A. 24-25).⁷ The agents then arrested respondent for possessing heroin (A. 13).⁸

3. The district court denied petitioner's motion to suppress the heroin found on her person (Pet. App. 9a-20a). The court concluded that the agents' action in initially approaching respondent and asking to see her ticket and identification was a permissible investigative stop under the standards of *Terry v. Ohio*, 392 U.S. 1 (1968), and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), because it was based on specific and articulable facts that, in light of the agents' substantial experience, justified a reasonable suspicion of criminal activity and warranted the limited intrusion involved (Pet. App. 13a-16a). The court also found that respondent was not placed under arrest by having been asked to accompany the agents to the DEA office, that she had done so voluntarily and in a spirit of apparent cooperation, and that she was not arrested until after the heroin had been found (Pet. App. 16a). Finally, the court, specifically crediting Agent Anderson's testimony, found that respondent "gave her consent to the search [in the DEA office] and * * * such consent was freely and voluntarily given" (*ibid.*).⁹

⁷ The search took five to ten minutes (A. 13).

⁸ Respondent was charged with possession of approximately 250 grams of heroin (Pet. App. 10a).

⁹ The court also concluded that, although respondent was not arrested until after she had been searched and the heroin

4. A panel of the court of appeals reversed in a judgment order, stating only that "the court concludes that this case is indistinguishable from *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977)" (Pet. App. 8a).

In *McCaleb*, the court of appeals suppressed heroin seized by DEA agents at the Detroit Airport in substantially similar circumstances.¹⁰ The court rejected the government's reliance on the agents' experience

discovered, the agents had probable cause to arrest her before the search. The court outlined all of the facts known to the agents at that time, including the fact that respondent had been travelling under two different aliases, and concluded (Pet. App. 18a): "Although each of these facts, in and of themselves, are [*sic*] relatively innocuous and innocent, when all of them are found to coincide, and all of them are known characteristics of airborne drug couriers, they furnish the officer observing them with probable cause. To hold otherwise would be to direct DEA agents to forget all of their training and experience, to ignore the obvious, and to not use all of the education and investigative know-how which they are required to acquire and cultivate in order to obtain and keep their jobs."

¹⁰ There are a number of differences between the facts in *McCaleb* and the instant case: for example, *McCaleb* involved three suspects travelling together; one of them claimed one suitcase from the luggage claim; and the agent, in asking consent to search the bag and advising them of their right to refuse, also advised them that if consent were refused, he would detain them while he sought a search warrant (552 F.2d at 719). See also note 50, *infra*. But the salient facts of the two cases are substantially similar—for example, round trips of short duration to Los Angeles, apparently little or no checked luggage, nervous behavior, use of aliases, and consents to search—and they present the same general questions of law.

and the "drug courier profile" (see note 3, *supra*), holding that the circumstances did not give rise to a reasonable and articulable suspicion justifying the initial approach and request for identification for the reason that "[t]he activities of the appellants in this case observed by DEA agents, were consistent with innocent behavior." 552 F.2d at 720.

The court in *McCaleb* further concluded that, even if the initial approach had been permissible, asking the suspects to accompany the agents to a private room for further questioning constituted an arrest requiring probable cause because at that point "appellants * * * were not free to leave [and thus] the arrest was clearly complete." *Ibid.* Finally, the court in *McCaleb* concluded that the consent to search in that case was not voluntary, primarily because of what the court believed to be the unconstitutional nature of the preceding stop and detention. *Id.* at 720-721.¹¹

The case was reheard by the court en banc, which reinstated the panel decision stating simply that the majority was convinced that in this case there was not "valid consent to search within the meaning of

¹¹ The court relied for this conclusion on *United States v. Bazinet*, 462 F.2d 982, 989 (8th Cir.), cert. denied, 409 U.S. 1010 (1972), in which the court stated that "the mere fact that a person has been arrested in violation of his constitutional rights casts grave doubt upon the voluntariness of a subsequent consent. The government has a heavy burden of proof in establishing that the consent was the voluntary act of the arrestee and that it was not the fruit of the illegal arrest" (footnote omitted).

[*McCaleb*]" (Pet. App. 2a).¹² The court also stated that it should "not * * * attempt to formulate definitive rules. Despite some general similarities, every single case differs from every other in material degree" (*ibid.*). The court did hold that "the so-called drug courier profile" does not, in itself, represent a legal standard of probable cause.

Judge Weick dissented. He noted that the majority had declined to decide any of the "questions of exceptional importance to be considered in connection with investigations by experienced federal agents of traffic in huge quantities of narcotics flowing into the Detroit airport * * *" (Pet. App. 4a). To the extent the majority relied on principles stated in *McCaleb*, Judge Weick concluded that "it is time to overrule *McCaleb* and its progeny" (*id.* at 6a).¹³

¹² The court addressed the legality of the detention only implicitly. It is clear that its holding that the consent was not valid was based on the premise that the detention was unlawful, as in *McCaleb*, both because there was no reasonable suspicion justifying the stop and because an arrest requiring probable cause was effected when respondent was taken to the office for questioning.

¹³ The instant case was considered by the en banc court jointly with *United States v. Camacho*, No. 78-5081. That case presented many of the same issues as this one and was disposed of by the court of appeals in the same manner. We did not seek review of the decision in *Camacho* because of the presence of certain additional factual circumstances that cast doubt upon the voluntariness of the consent to search in that case.

SUMMARY OF ARGUMENT

This case concerns the admissibility into evidence of contraband seized during a consent search. The court of appeals held that the evidence was inadmissible because it was the fruit of an illegal detention. Three distinct issues are presented: (1) whether an illegal seizure occurred when agents approached respondent in an airline terminal and asked her for identification; (2) whether it was illegal for the agents to ask respondent to accompany them to a nearby office for further questioning in the absence of probable cause; and (3) assuming that respondent was illegally seized at some point, whether her subsequent voluntary consent was invalid as a "fruit" of an illegal seizure.

I

The question whether respondent was illegally seized during the initial encounter in the airport concourse involves two distinct inquiries. First, it must be determined whether any "seizure" occurred within the meaning of the Fourth Amendment. If a "seizure" did occur, the question arises whether it was "illegal" or instead reasonably justified by the agents' grounds for suspicion.

A. The Court has recognized in *Terry v. Ohio*, 392 U.S. 1 (1968), and elsewhere that not all encounters between citizens and police officers constitute "seizures" that implicate the protections of the Fourth Amendment, although it has not had occasion to specify the precise criteria for determining whether particular encounters implicate the Fourth Amend-

ment. It is clear that a "seizure" does occur when a citizen is required to stay and submit to questioning by an officer; conversely, when an encounter does not entail a forcible detention (whether by physical restraint or other assertion of authority), no "seizure" has occurred. Policemen are free to seek cooperation from private citizens, even those suspected of criminal activity.

The test for determining whether a particular encounter constitutes a seizure focuses upon whether a reasonable person would have been under the impression that he was not free to leave the officer's presence. When the agent does not state to the individual whether he is free to leave and the latter never attempts to leave or to clarify his status, an ambiguous situation is presented that does not readily lend itself to a later, objective determination by a court whether a seizure has occurred. It is our submission that, in the absence of objective facts relating to the officer's actions or the surrounding circumstances from which it could reasonably be concluded that the person is not free to leave, the action of a police officer in approaching a person and asking a question or requesting identification should not be held to constitute a "seizure."

B. Assuming that the agents' approach to respondent did constitute a seizure of her person implicating the protections of the Fourth Amendment, we submit that it was a lawful *Terry* stop based upon a reasonable suspicion of criminal activity. The agents here relied on "specific and articulable facts" that they

observed, which indicated to them that respondent might be carrying drugs. The court of appeals rejected these facts as insufficient to support a *Terry* stop, noting that they were "consistent with innocent behavior." This standard cannot be a proper one, for even a finding of probable cause does not require that the observed facts be inconsistent with some hypothesis of innocent behavior.

A factor in the agents' suspicion was the coincidence of the facts that they observed with a "drug courier profile," an informal compilation of agents' experience that identifies certain characteristics as tending to distinguish drug couriers from ordinary passengers. We disagree with the implication of the court of appeals' opinion that the coincidence with profile characteristics is largely irrelevant. The profile is a legitimate method of pooling the experience of many agents in an organized fashion. Although the characteristics observed by the agents may seem innocent to the layman, it is appropriate to consider their meaning in the eyes of experienced agents. See *Brown v. Texas*, No. 77-6673 (June 25, 1979), slip op. 4 n.2. The factors relied on here were quite similar to those factors that the Court suggested as relevant in *United States v. Brignoni-Ponce*, 422 U.S. 873, 884-885 (1975). We do not contend that the presence of factors contained in the drug courier profile *ipso facto* establishes a reasonable suspicion, but we do submit that the correlation of a person's behavior with profile characteristics is properly considered by the agents in determining whether a reasonable suspicion exists justifying a stop.

The reasonableness of an intrusion “depends on a balance between the public interest and the individual’s right to personal security.” *Brignoni-Ponce*, *supra*, 422 U.S. at 878. The government interest involved here of controlling illegal narcotic traffic is substantial, and the intrusion of a brief investigation is not great, as compared to the stop and frisk upheld in *Terry*. The facts observed by the agents certainly gave them grounds for suspicion sufficient to justify the minimal intrusion involved here.

II

A. The district court found that respondent accompanied the agents from the airport concourse to the nearby office “voluntarily in a spirit of apparent cooperation” (Pet. App. 16a). The move to the office, therefore, was by consent and does not constitute an intrusion that must be justified by satisfaction of the procedural or substantive requirements of the Fourth Amendment applicable in the absence of consent. The court of appeals apparently disregarded this consent on the ground that respondent was at that point not free to leave. The basis for this assertion is presumably the testimony by the agent that he would have stopped respondent from leaving after she agreed to go to the office. This subjective intent is irrelevant to the question of respondent’s content. See *Scott v. United States*, 436 U.S. 128, 136-137 (1978). In any event, the court’s analysis is erroneous. To the extent that the alleged illegality consist of the move to the office, the relevant inquiry is the freedom to decline to move to the office. There is no evidence in the

record that would support a finding that respondent had any objective basis for feeling compelled to agree to go to the office; the district court's finding that she went voluntarily is thus adequately supported and should have been accepted as dispositive by the court of appeals.

B. Assuming that respondent's voluntary consent to go to the office was not valid, the court of appeals erred in any event insofar as it held that the move constituted an arrest requiring probable cause. First, the court's assertion that an arrest occurred because respondent was not free to leave is manifestly incorrect. Whether or not a person is free to leave determines whether a "seizure" has occurred, not whether there has been an arrest; a person detained during a lawful investigative stop, although plainly not arrested, is nevertheless not free to leave. Second, the mere fact of movement to an office does not imply that an arrest requiring probable cause has occurred. A person may be required to move from where he is stopped pursuant to a lawful investigative stop, see *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); the lawfulness of the move is determined by its reasonableness under the circumstances. Here, the intrusion involved in the move of about 50 feet was quite small and must be balanced against significant practical considerations that rendered it reasonable to continue the investigation away from the public area of the terminal.

III

The record fully supports the finding of the district court that respondent's consent to the search was

"freely and voluntarily given" (Pet. App. 16a). The court of appeals does not appear to have rejected that finding; instead, it apparently invalidated the search as a "fruit" of an antecedent illegal detention. Granting *arguendo* the premise that respondent was illegally detained at the time she consented to the search, we submit that the court of appeals was nevertheless incorrect in determining that respondent's consent was invalid as the fruit of an illegal detention. When a person who is being illegally detained consents to a search after being advised of his right to refuse, that consent is an independent event, not an exploitation of the illegality.

Brown v. Illinois, 422 U.S. 590 (1975), which held that *Miranda* warnings do not necessarily dissipate the taint of an illegal arrest, is not to the contrary. First, *Brown* relied on the fact that *Miranda* warnings protect against Fifth Amendment violations and cannot remedy Fourth Amendment violations. In this case, the finding of a voluntary consent addresses the interests of the Fourth Amendment and can act to dissipate the taint of a prior Fourth Amendment violation.

Second, the attenuation principles set forth in *Brown* establish that the taint of any illegal detention was purged by the intervening event of the advice to respondent that she had a right to refuse to consent to a search. Unlike the *Miranda* warnings in *Brown*, which are constitutional prerequisites to an admissible confession, the advice here was not required in order to obtain a voluntary consent and was effective

to dispel any conclusion respondent might otherwise have drawn that because she was in temporary police custody she was not free to withhold consent to a search of her person. Thus the giving of the advice was a significant intervening event that served to break the causal connection between the allegedly illegal detention and the search. In addition, the conduct of the agents cannot be characterized as flagrant, particularly when compared to the police misconduct in *Brown* and *Dunaway*. Consequently, the *Brown* attenuation analysis indicates that the consent in this case was a valid one, not tainted by the alleged illegal detention.

ARGUMENT

The ultimate question in this case is the lawfulness of the search of respondent's person and the seizure of heroin from her. The court of appeals did not question the district court's finding that respondent had voluntarily consented to the search of her person, but instead suppressed the seized heroin on the ground that the search was an unattenuated fruit of prior Fourth Amendment violations. In Part I of this brief we argue that the initial contact between respondent and the DEA agents in the airport concourse was not a seizure of her person implicating the Fourth Amendment, and, even if it was, that the agents had sufficient reasonable suspicion of her involvement in criminal activity to justify a brief detention of her for purposes of further inquiry. In Part II we contend that the move from the airport

concourse to a nearby office was justified by respondent's voluntary consent and, in any event, was a reasonable action under the facts and circumstances known to the officers, and not an arrest requiring probable cause. Finally, in Part III, we argue that respondent's voluntary consent to the search of her person was sufficient to render the search lawful even if the consent was given at a time when respondent was being illegally detained.

I. RESPONDENT WAS NOT ILLEGALLY SEIZED WHEN FEDERAL NARCOTICS AGENTS APPROACHED AND QUESTIONED HER IN THE AIRPORT CONCOURSE

A. Respondent Was Not "Seized" Within The Meaning Of The Fourth Amendment When The Agents Approached Her And Requested To See Her Identification And Airline Ticket

As this Court recognized in its opinion in *Terry v. Ohio*, 392 U.S. 1 (1968), not all street encounters between citizens and police officers constitute "seizures" that implicate the protections of the Fourth Amendment. A "seizure" has occurred "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen * * *." 392 U.S. at 19 n.16. As Justice White observed in his concurring opinion in *Terry* (392 U.S. at 34), "[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." Justice Harlan noted that, as any other citizen, a policeman has the right to address questions to other persons if the

person addressed has an equal right to ignore his interrogator and walk away. *Id.* at 32-33. See also *Davis v. Mississippi*, 394 U.S. 721, 727 n.6 (1969); *Miranda v. Arizona*, 384 U.S. 436, 477-478 (1966).

In *Terry*, the Court stated that it was unable to tell from the record whether any "seizure" had occurred when the police officer approached Terry and asked his identity, and it thus assumed that until the officer made physical contact with Terry in frisking him, "no intrusion upon constitutionally protected rights had occurred." 392 U.S. at 19 n.16. Similarly, in *Sibron v. New York*, 392 U.S. 40 (1968), the Court again was unable to discern from the record whether Sibron was "seized" when an officer approached him in a restaurant and told him to come outside. The Court suggested that that determination depended upon whether "Sibron accompanied [the officer] * * * voluntarily in a spirit of apparent cooperation with the officer's investigation," rather than in submission to a "show of force or authority which left him no choice." *Id.* at 63. In *Adams v. Williams*, 407 U.S. 143 (1972), as well, the Court suggested that a "seizure" did not occur as long as an individual was voluntarily cooperating with the police. In connection with its finding that a forcible stop had occurred in that case, the Court noted that the state did not contend that Williams acted voluntarily in rolling down the window of his car after an officer requested that he open the door. *Id.* at 146 n.1.

These cases certainly suggest that a Fourth Amendment "seizure" does not occur until an individual's

freedom of movement is curtailed or he involuntarily submits to a show of authority. While the Court has not had occasion to define the class of encounters that do not amount to a seizure, it seems clear that a seizure does not necessarily occur whenever an officer identifies himself as such upon approaching an individual.¹⁴ People may cooperate with brief questioning by police either because they feel it is their civic duty or because they feel obliged to defer to authority.¹⁵ Whatever its psychological or sociological wellsprings may be, voluntary cooperation with the police does not constitute an intrusion that implicates the protection of the Fourth Amendment.¹⁶

¹⁴ See 3 W. LaFave, *Search and Seizure*, *A Treatise on the Fourth Amendment*, § 9.2 at 53 (1978) (hereinafter cited as LaFave):

[A] street encounter would not amount to a Fourth Amendment seizure merely because * * * one party to the encounter is known by the other to be a police officer.

¹⁵ *The Model Code of Pre-Arrest Procedure* § 110.1 commentary at 258 (Proposed Official Draft 1975) (hereinafter cited as ALI Model Code), notes that policemen are entitled "to seek cooperation, even where this may involve inconvenience or embarrassment for the citizen, and even though many citizens will defer to this authority of the police because they believe—in some vague way—that they should, [because] the moral and instinctive pressures to cooperate are in general sound and may be relied on by the police."

¹⁶ The fact that the police officer suspects the person approached of criminal activity does not convert a voluntary contact into a "seizure." In *Terry*, *Sibron*, and *Adams*, the contact that the Court indicated might not implicate Fourth Amendment protections was with an individual under suspicion by the police.

While the foregoing general principles are clear enough, their application to particular sets of circumstances is less clear. If, on the one hand, the officer advises the individual he has approached that he is not required to stay or respond to the officer's questions, this would ordinarily suffice to clarify the nature of the encounter as not being a seizure implicating the Fourth Amendment. If, on the other hand, the citizen inquires whether he is free to go and is told that he is not, this too resolves any uncertainty and establishes that a seizure has occurred. The problem arises when, as is common, nothing is said either by the officer or by the citizen clarifying the latter's liberty to go or obligation to stay, and the courts are thereafter confronted with a substantially ambiguous set of objective facts from which they must determine whether a seizure of the person has indeed occurred.

The general analytical framework for the determination whether a particular encounter is a Fourth Amendment seizure (or whether a seizure is an "arrest" rather than merely a *Terry* "stop") seems to be tolerably clear: the determination is to be made by reference to the objective facts and circumstances surrounding the transaction, rather than on the basis of the subjective beliefs or intentions of either the citizen or the officers.¹⁷ The existence of this frame-

¹⁷ See *United States v. Wylie*, 569 F.2d 62, 68 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978), where the court stated that whether a seizure has occurred depends upon "whether the person [approached] was 'under a reasonable

work, while it tells courts what to look for, still does not tell them what to make of cases in which the objective facts surrounding the encounter are ambiguous in their import.

impression that he [was] not free to leave the officer's presence.' " This test is purely objective: " 'what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes.' " *Ibid.*, quoting *Coates v. United States*, 413 F.2d 371 (D.C. Cir. 1969).

It has long been established that an objective standard must be used in determining whether an arrest has occurred; the subjective intent of the officer is irrelevant. See *United States v. Oates*, 560 F.2d 45, 58 (2d Cir. 1977); *United States v. Grandi*, 424 F.2d 399, 401 (2d Cir. 1970); *Coates v. United States*, *supra*; *Lowe v. United States*, 407 F.2d 1391, 1397 (9th Cir. 1969); *Williams v. United States*, 381 F.2d 20, 22 (9th Cir. 1967). As the Court stated in *Scott v. United States*, 436 U.S. 128, 137 (1978):

[A]lmost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him.

Thus the Court found proper the government's contention that:

[T]he existence *vel non* of [a Fourth Amendment] violation turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time. Subjective intent alone * * * does not make otherwise lawful conduct illegal or unconstitutional. [*Id.* at 136-137].

Consequently, Agent Anderson's testimony at the suppression hearing that he would have stopped respondent if she had attempted to leave after producing her driver's license, which did not accord with the name on her ticket (A. 18-19), has no bearing on the determination whether a seizure occurred. See *United States v. Wylie*, *supra*, 569 F.2d at 69 n.7.

This is such a case. Two plainclothes officers approached respondent, identified themselves as federal agents, and asked if they could see her identification. She did not ask whether she was free to go or indicate that she wished to leave, and the officers said nothing on the point; they simply asked their questions, and she answered them. It is our submission that such confrontations are not Fourth Amendment seizures, as a matter of law, in the absence of some facts relating to the officers' actions or the surrounding circumstances, beyond the initial approach and the request for identification or posing of questions, from which the individual could reasonably have inferred that he was not free to leave.¹⁸ We thus agree with Professor LaFave's suggestion that police-citizen encounters should constitute a seizure

[o]nly if the officer added to those * * * pressures [inherent in any police-citizen encounter] by engaging in menacing conduct significantly

¹⁸ Nothing in *Brown v. Texas*, No. 77-6673 (June 25, 1979), is inconsistent with this analysis. The Court there held that when officers approached Brown on the street and asked him to identify himself, they "seized" Brown for Fourth Amendment purposes. While this conduct by the officers, on its face, does not seem very different from the conduct that *Terry* suggests would not constitute a "seizure," the critical difference is the Texas statute involved in *Brown*. That statute, Tex. Penal Code Ann. § 38.02 (Vernon 1974), made it a crime for Brown to refuse to give his name and address to the officers. Hence, Brown was *ipso facto* seized when the officers approached him and asked his identity; he was compelled by law to answer their inquiry as to his identity or face arrest for his refusal to do so.

beyond that which is accepted in social intercourse.

Under this approach, the critical inquiry would be whether the policeman, although perhaps making inquiries which a private citizen would not be expected to make, has otherwise conducted himself in a manner consistent with what would be viewed as a nonoffensive contact if it occurred between two ordinary citizens.

3 LaFave, *supra*, § 9.2 at 53.¹⁹

In the context of DEA airport encounters, two courts of appeals have noted the applicability of the principle that a police contact and propounding of questions does not necessarily rise to the level of a seizure. The Fifth Circuit held, upon facts similar to those in this case, that the initial approach and request for identification and airline ticket was a contact that does not constitute a "seizure." See *United States v. Elmore*, 595 F.2d 1036, 1037-1042 (1979), petition for cert. pending, No. 78-6884. The Second Circuit, in *United States v. Price*, 599 F.2d 494, 498 (1979), noted but reserved the question. See also *People v. Clifford*, 2d Crim. No. 33085 (Cal. App., March 16, 1979). Other courts have found similar contacts not to be seizures in other contexts. See *United States v. Wylie*, *supra*; *United States v. Brun-*

¹⁹ Examples of factors that would indicate a seizure even where the individual did not attempt to leave might be the presence of several uniformed officers, the display of a weapon, some physical touching of the individual, or use of tone of voice or language indicating a demand, rather than a request. See generally 3 LaFave, *supra*, § 9.2 at 54.

son, 549 F.2d 348, 356-358 (5th Cir.), cert. denied, 434 U.S. 842 (1977).

In the instant case, we believe that the record shows that respondent had no objective reason to conclude that she was not free to leave the conversation in the concourse, and thus that the agents' initial approach to her did not constitute a seizure. The agents approached respondent in a public concourse of the airport. The agents wore no uniforms and displayed no weapons. They did not summon respondent to their presence, but instead approached her and politely identified themselves as federal agents. They requested, but did not demand, to see respondent's identification and ticket. In short, the agents' conduct did not convey that respondent was not free to go. Moreover, nothing in the record suggests that respondent replied to the agents' requests and questions other than in a spirit of voluntary cooperation. Thus, even were the court of appeals correct in concluding that the facts known to the officers would not have justified a *Terry* stop of respondent—a question to which we turn next—its ruling was erroneous because the initial encounter was not a “seizure” of respondent's person.

B. Even If The Initial Encounter With Respondent Constituted A Fourth Amendment Seizure Of Her Person, It Was Justified By Reasonable Suspicion Of Criminal Activity

This Court has explicitly held in *Terry* and subsequent cases that police officers may briefly detain a person for investigative purposes on less than prob-

able cause, if they have a reasonable suspicion that an individual is engaged in criminal activity. 392 U.S. at 20-27. See *Adams v. Williams*, 407 U.S. 143, 146-149 (1972); *United States v. Brignoni-Ponce*, 422 U.S. 873, 880-882 (1975). The suspicion must be based upon "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion" (392 U.S. at 21; footnote omitted). The reasonableness of an officer's conduct can be determined only " 'by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' " 392 U.S. at 21, quoting *Camara v. Municipal Court*, 387 U.S. 523, 534-535, 536-537 (1967). The lawfulness of a detention thus depends on consideration both of the facts supporting the suspicion and of the degree and purposes of the intrusion. See also *Delaware v. Prouse*, No. 77-1571 (March 27, 1979), slip op. 5. Under these criteria, we believe that the agents had a sufficient reasonable suspicion to detain respondent at the time they approached her.

1. The court of appeals in *McCaleb* (and presumably in this case) held that the agents had no reasonable suspicion that warranted stopping the suspects, noting that the activities observed by the agents "were consistent with innocent behavior." 552 F.2d at 720. It is plainly incorrect to set up consistency with innocent behavior as a standard for determining whether certain conduct gives grounds for reasonable suspicion. See *United States v. Price*, *supra*, 599 F.2d at 502. Certainly the facts that this

Court held warranted a stop and frisk in *Terry* or said could justify an automobile stop in *Brignoni-Ponce* were consistent with innocent behavior. Indeed, virtually any set of facts can be said to be "consistent with innocent behavior," even if a high probability of criminal activity is indicated.²⁰ Clearly, *Terry* does not require a finding of a virtual certainty of criminality to support a stop.

It is possible that the court of appeals may have intended to suggest instead only that reasonable suspicion cannot exist if the observed behavior is more consistent with innocence than with criminality. Thus interpreted, however, the standard would still be incorrect; if the observed or known facts establish a probability of criminality, they would constitute probable cause, see, e.g., *Adams v. Williams*, *supra*, 407 U.S. at 148; *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *United States v. Holland*, 510 F.2d 453, 455 (9th Cir.), cert. denied, 422 U.S. 1010 (1975), and it is plain that the quantum of suspicion required for a stop is less than probable cause.

2. The agents in this case did have a reasonable suspicion based on "specific and articulable facts" that warranted stopping respondent for further inquiry. The agents' attention was drawn to respondent when she was the last passenger to deplane from her early morning American Airlines flight. Respondent appeared very nervous as she came off the airplane

²⁰ Even the reasonable doubt standard does not require an instruction that the evidence is inconsistent with some conceivable hypothesis of innocent behavior. See *Holland v. United States*, 348 U.S. 121, 139-140 (1954).

and completely scanned the whole area where the agents were standing (A. 9, 14). In Agent Anderson's experience, drug couriers often deplane last, particularly on early morning flights, in order to have a clear view of the terminal so that they can more easily detect agents who might be watching them (A. 9). Respondent's plane had arrived from Los Angeles, which was known to the agents to be a major source city for narcotics (A. 8-9). Respondent was not met by anyone, and she proceeded past the baggage claim area to the Eastern Airlines ticket counter (A. 10). Although respondent's airline ticket showed that she was already booked on American Airlines from Los Angeles through Detroit to Pittsburgh, respondent inquired about changing her booking from American to Eastern, keeping Pittsburgh as her destination. Agent Anderson was aware that couriers frequently change airlines and flight times to evade surveillance (A. 10-11).²¹ When the ticket agent informed respondent that her ticket did not need to be rewritten, she headed for the Eastern flight departure gate without inquiring about or making any arrangements for the transfer of any luggage from the American to the Eastern flight (A. 11). It was thus fairly inferable that she had no luggage other than her purse. The absence of

²¹ This is presumably thought prudent to guard against the risk that someone has given the authorities a tip that a narcotics courier would be arriving in a given city on a particular flight. See, e.g., *United States v. Afanador*, 567 F.2d 1325 (5th Cir. 1978).

luggage on a cross-country trip is unusual and, in the agents' experience, is a common characteristic of drug couriers (A. 8, 10).

Thus, at the time the agents approached respondent, they knew that she had arrived from a source city, that she had apparently taken a cross-country trip without luggage and that she had changed her flight plan for no apparent purpose. They had observed her carefully scan the terminal as if looking for someone, though no one met her, and indeed she was only stopping in Detroit on her way to Pittsburgh. Finally, they had noticed that she exhibited unusual nervousness. These specific facts suggested that respondent was seeking to avoid detection and that she might be engaged in some illicit activity. In addition, several of the facts observed by the agents coincided with facts that agents at the Detroit airport had determined, in their experience, to be common characteristics of drug couriers, often called a "drug courier profile." The district court found that these facts, in the agents' experience, gave them reason to suspect that respondent might be a drug courier,²² as she in fact proved to be.

²² The district court specifically found (Pet. App. 15a):

[W]hen all of these factors—flight from a source city, last passenger to deplane, the nervous scanning of the entire airport area, apparent lack of luggage although coming from a great distance, the changing of airlines without apparent justification even though in possession of a valid ticket to the same destination—are found to coincide, a *Terry* type intrusion in order to determine [respondent's] identity and obtain more information is justified.

The court of appeals seemed to be troubled by two separate factors in concluding that respondent's observed activities did not give the agents sufficient reasonable suspicion to stop her for questioning. First, the court seemed to consider the correlation with the "drug courier profile" as largely irrelevant, holding specifically that "the so-called drug courier profile does not, in itself, represent a legal standard of probable cause in this Circuit" (Pet. App. 2a). In this case and in *McCaleb*, of course, the court found not only that there was no probable cause, but that there was no reasonable suspicion that could justify an investigative stop. Although we have never suggested that "the drug courier profile, in itself," automatically constitutes either a standard of probable cause or of reasonable suspicion—the reasonableness of a stop must always be measured by the totality of the facts—we do contend that a correlation of observed facts with the drug courier profile should not be disregarded, but is in fact a significant and legitimate consideration in determining the permissibility of a stop.

The failure of the court of appeals to give due consideration to coincidence with the profile may stem from a misunderstanding of its nature and function. The drug courier profile is simply a shorthand compilation of expertise gained by DEA agents in their experience in the detection of drug couriers.²³ It is

²³ As a factual matter, there is no national profile; each airport unit has developed its own set of drug courier characteristics on the basis of that unit's experience. While many

unthinkable that a police officer's experience should not be given some consideration in examining whether reasonable suspicion exists for an investigative stop. By the same token, it is only good police work for officers to augment their own knowledge by pooling their experience with that of other officers. The profile is simply a method of reducing this cumulative experience to a written or organized form. Thus the profile is not a mechanical substitute for an agent's judgment; rather, it serves to inform that judgment. The reasonableness of each stop must still be measured by the totality of the observed facts, and the coincidence of these facts with profile characteristics does not necessarily make the stop reasonable (*e.g.*, if other observed facts negate the reasonableness of the inferences). But it is equally true that a high coincidence between observed facts and profile characteristics can be quite significant. In practice, the profile has proven to be very effective as an aid to DEA agents in detecting drug couriers.²⁴

of the salient characteristics are common to the guidelines of most, if not all units, there are some differences based on the particular experiences of different units and the peculiar trafficking patterns of each airport. Furthermore, the profile is not rigid, but is constantly modified in light of experience.

²⁴ Comprehensive statistics on the success of the airport program have not been kept. Those that have been tabulated, however, indicate that it has been quite successful. In *United States v. Van Lewis, supra*, the court found (409 F. Supp. at 539) that since the initiation of the program, "agents have searched 141 persons in 96 airport encounters [*i.e.*, encounters where a search ensues] prompted by their use of the courier profile and independent police work. * * * Agents found con-

Police officers often recognize behavior as possibly criminal because their training and experience suggest that similar behavior in the past was indicative of criminal activity. In using their experience, they simply rely on a type of informal mental profile of criminal behavior that they have developed. Similarly, informal profiles are used in other disciplines. A doctor making a diagnosis compares observed symptoms to a profile of characteristics exhibited by various diseases. Use of a "profile" is a legitimate method of using one's experience in an organized fashion to assess the likelihood of a particular conclusion.²⁵

Accordingly, the courts have recognized and approved the use of profiles in other contexts.²⁶ Profiles

trolled substances in 77 of the 96 encounters and arrested 122 persons for violations of the narcotics laws." Further data demonstrating the success of the program is set forth in Judge Weick's dissent (Pet. App. 4a n.1). See note 1, *supra*.

²⁵ There can be no justification for establishing a general rule rejecting the use of any profile. Depending on the characteristics included in a profile, coincidence with a profile may even be sufficient to demonstrate probable cause. For example, brandishing a weapon in a bank would no doubt constitute probable cause for arrest. Such conduct would not give any less cause for arrest if it were listed as a factor in a "bank robber's profile."

²⁶ See, e.g., *State v. Ochoa*, 112 Ariz. 582, 544 P. 2d 1097 (1976), which involved the use of a profile to detect stolen vehicles. There, the profile had been developed by representatives of various federal and state agencies in order to stem the flow of stolen vehicles that were being taken to Mexico, where they were either sold or traded for narcotics. The profile was developed from an analysis of the several thousand thefts that had occurred in the Phoenix area during

of "skyjackers" were important and legitimate aids in the early airport security program to reduce the incidence of airplane hijackings.²⁷ A "smuggling profile" has been properly and successfully used as an aid by the U.S. Customs Service.²⁸ Indeed, other

the preceding 17 months. Factors included the type of vehicle, the age of the driver, the fact that the driver would often be alone and carry no luggage, and the fact that the vehicle's license plate would show a registration to one of two Arizona counties. The court held that a coincidence with profile characteristics provided specific and articulable facts which, when taken together with rational inferences therefrom, warranted a brief detention in order to check the driver's license and vehicle registration. Cf. *United States v. Carrizosa-Gaxiola*, 523 F.2d 239 (9th Cir. 1975) (fact that model of car fit profile not sufficient to create reasonable suspicion). See also *State v. Becerra*, 111 Ariz. 538, 534 P. 2d 743 (1972) (stop by border patrol officers lawful because the combination of circumstances observed fit a "profile" sufficient to sustain a stop and search for illegal aliens).

²⁷ See, e.g., *United States v. Cyzewski*, 484 F.2d 509 (5th Cir. 1973), cert. dismissed, 415 U.S. 902 (1974); *United States v. Bell*, 464 F.2d 667 (2d Cir.), cert. denied, 409 U.S. 991 (1972).

The hijacking profile was empirically derived from an analysis of known hijackers. Studies indicated that approximately one in 15 persons who was searched after being selected by use of the profile was found to have a weapon. *United States v. Lopez*, 328 F. Supp. 1077, 1084 (E.D. N.Y. 1971).

²⁸ See *United States v. Forbicetta*, 484 F.2d 645 (5th Cir. 1973). See also *United States v. Asbury*, 586 F.2d 973, 976-977 (2d Cir. 1978); *United States v. Kallevig*, 534 F.2d 411 (1st Cir. 1976).

courts have spoken approvingly of the use of the drug courier profile that is involved in this case.²⁹

The second factor that seems to have troubled the court of appeals is that the activities observed by the agents, which gave rise to their suspicion, seem fairly innocuous to the layman—hence the court's comment in *McCaleb* that the activities were "consistent with innocent behavior." 552 F.2d at 720. To the extent that the court looks at the activities through the eyes of a layman, however, it errs in disregarding the experience of the agents. It is only to be expected that agents trained and experienced in detecting drug couriers would find significance in facts that the layman might not even notice. In *Brown v. Texas*, No. 77-6673 (June 25, 1979), this Court noted the importance of "the observations of a trained, experienced police officer who is able to perceive and articulate meaning in given conduct which would be *wholly innocent* to the untrained observer" (slip. op. 4 n.2) (emphasis added).³⁰

²⁹ See *United States v. Price*, *supra*, 599 F.2d at 500-501; *United States v. Van Lewis*, *supra*, 409 F. Supp. at 544-545; *State v. Reid*, *supra*. But see *United States v. Ballard*, 573 F.2d 913, 915 (5th Cir. 1978).

³⁰ The district court, in determining that the agents here had probable cause before they searched respondent, noted (Pet. App. 18a):

To hold otherwise would be to direct DEA Agents to forget all of their training and experience, to ignore the obvious, and to not use all of the education and investigative know-how which they are required to acquire and cultivate in order to obtain and keep their jobs.

There seems little point in training DEA agents in drug enforcement if they are entitled to stop or arrest suspects only on grounds that would be equally apparent to any layman.

There can be no doubt that facts such as those relied upon by the agents in this case are "specific and articulable," and appropriately considered in determining whether a reasonable suspicion exists that justifies an investigative stop. In *United States v. Brignoni-Ponce*, *supra*, 422 U.S. at 884-885, the Court outlined the type of facts that might be relevant in deciding whether to make an investigative stop in the context of searching for illegal aliens. The factors considered in this case are quite similar to those noted in *Brignoni-Ponce*. The knowledge that respondent came from a source city for narcotics is analogous to the factor in *Brignoni-Ponce* concerning the "characteristics of the area" where the vehicle is found and its "proximity to the border." In *Brignoni-Ponce*, the Court noted the relevance of "the driver's behavior" and "attempts to avoid officers"; here, respondent was observed to be nervous, scanning the terminal as if looking for someone, and making flight arrangements that could well have been designed to avoid surveillance. The Court also noted that "aspects of the vehicle" may provoke suspicion; here the agents noted the unusual absence of luggage. Finally, the Court emphasized in *Brignoni-Ponce* that "[i]n all situations the officer is entitled to assess the facts in light of his experience." 422 U.S. at 885.

On the facts in *Brignoni-Ponce*, the Court held that the mere fact that the suspects appeared to be of Mexican ancestry was not a cause for suspicion sufficient to differentiate the stop from a random stop. 422 U.S. at 883, 885-886. Here, in contrast, the agents relied on the combination of several different factors that they found to be significant. The facts noticed by the agents here would occur in only a small percentage of airplane passengers, as compared with the broad applicability of the Mexican ancestry factor relied on by the agents in *Brignoni-Ponce*.

Finally, it must be emphasized that the facts observed by the agents must be considered together and in context, rather than individually. Each individual fact observed by the agents may well have been unremarkable, but taken together, with the additional knowledge that several of the factors were known to be associated with drug couriers, they provided a reasonable suspicion that respondent was a drug courier. See *United States v. Price*, 599 F.2d 494, 501 (2d Cir. 1979); *United States v. Oates*, 560 F.2d 45, 61 (2d Cir. 1977).³¹ The agents' observations are considered significant only in a context; an agent noticing similar behavior on the street would

³¹ See also *United States v. Hall*, 525 F.2d 857, 859 (D.C. Cir. 1976), where the court stated:

[I]n judging the reasonableness of the actions of the officer the circumstances before him are not to be dissected and viewed singly; rather they must be considered as a whole. So considered they are to be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training.

not necessarily suspect any criminal activity. However, the observation of respondent's behavior after deplaning from a flight arriving from a major source city for narcotics, coupled with the knowledge of common drug courier characteristics, suggested to the agents that respondent might be a drug courier.

It is hardly surprising that respondent did not engage in any conduct that would have been highly suspicious to an untrained observer. In *Terry*, the activities of the defendant that led the police officer to suspect him of planning a robbery might also have aroused some suspicion in a layman. However, the crime involved, armed robbery, was one of action. At some point, at least by the time he robbed the store, Terry would have to have taken action that was clearly grounds for suspicion by anyone. In contrast, respondent here needed to take no action to complete her crime. Her only goal was to avoid detection, to do as little as possible. It is hardly reasonable to expect her to have drawn attention to herself in any way that would be obvious to a casual observer. The only way that a competent drug courier can reasonably be expected to give himself away is through subtle behavior that a trained agent might notice. In refusing here to credit the articulable suspicion of the agents based on their experience, the court has, in effect, established a requirement of probable cause for an investigation ~~stop~~^{stop}.³² In dealing with

³² The court seems to acknowledge this requirement in its holding that the "drug courier profile does not, in itself, represent a legal standard of probable cause" (Pet. App. 2a). See also *McCaleb*, *supra*, 552 F.2d at 720.

a crime such as the smuggling of drugs, which is based only upon concealment and escaping detection, this standard will be practically impossible to satisfy. The result of such a standard can only be to destroy the effectiveness of a program that has proven to be highly successful in intercepting a significant number of shipments of illicit drugs.

3. Finally, the court of appeals apparently made no attempt to balance the intrusion here against the government interest involved. The reasonableness of a seizure that does not require probable cause "depends on a balance between the public interest and the individual's right to personal security." *Brignoni-Ponce, supra*, 422 U.S. at 878. See also *Dunaway v. New York*, No. 78-5066 (June 5, 1979), slip op. 8; *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977); *Terry, supra*, 392 U.S. at 21. This balancing involves a "weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown v. Texas, supra*, slip op. 3.

We have argued above that the agents' initial approach to respondent did not constitute a "seizure" at all within the meaning of the Fourth Amendment. Assuming, however, that it was a seizure, it surely must rank as one of the least intrusive encounters that is protected by the Fourth Amendment. The agents politely asked to see respondent's identification and her ticket and asked her one or two other simple questions. The agents did not touch her. The

entire exchange, until respondent consented to be searched, lasted no more than six minutes. In contrast, the intrusion approved by this Court in *Terry* was significantly greater. The stop itself in *Terry* was considered a relatively minor intrusion; the significant intrusion was the frisk, which was characterized by the Court as a "severe" intrusion. 392 U.S. at 24. The Court stated (392 U.S. at 23):

The crux of this case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation.

Yet even the frisk in *Terry* was held to be warranted by the suspicious activity observed by the officer. We submit that a lesser degree of cause for suspicion is required in this case, where the encounter was significantly less intrusive than that in *Terry*.³³

Balanced against this limited intrusion is the important government interest in controlling illegal drug trafficking. The devastating societal impact of the enormous narcotics trade in this country is well documented.³⁴ As the court said in *United States v.*

³³ See *United States v. Nieves*, No. 79-1051 (2d Cir. October 30, 1979), where the court noted that an itinerary suggestive of wrongdoing and inadequate luggage established a degree of reasonable suspicion sufficient to justify the minimal intrusion of removing one's shoes. Slip op. 5325 n.6.

³⁴ See generally W. Seymour, *The Young Die Quietly: The Narcotics Problem in America* (1972).

Oates, supra, 560 F.2d at 59, the costs "in terms of ruined and wasted lives are staggering." The airport surveillance program has proven to be an effective tool in fighting the drug traffic. Over 130 pounds of heroin were seized at the Detroit airport alone under the program between 1975 and 1978 (Pet. App. 4a n.1). The government has a strong interest in continuing this program.

Moreover, the airport surveillance program cannot succeed without the use of investigative encounters of the type that occurred in this case. *Terry* teaches that an important element in the reasonableness analysis is consideration of "the scope of the particular intrusion, in light of all the exigencies of the case." 392 U.S. at 18 n.15. Generally, DEA agents have no advance warning of a courier's arrival; they are alerted to a suspect's presence only by his behavior. The agents have no way of knowing the suspect's name or address without briefly questioning him. Because of the distances involved and the readily disposable nature of the drugs, following the suspect is usually not a practical alternative. As the suspect prepares to leave the airport, the need for an investigative stop increases. See *United States v. Oates, supra*, 560 F. 2d at 59; *United States v. Magda*, 547 F. 2d 756, 759 (2d Cir. 1976), cert. denied, 434 U.S. 878 (1977); *United States v. Santana*, 485 F. 2d 365, 368 (2d Cir. 1973), cert. denied, 415 U.S. 931 (1974).

We submit that the stop by the agents in this case was reasonable. The agents were aware of "specific and articulable facts" that enabled them reasonably

to suspect respondent within the meaning of *Terry*. Moreover, the minimal nature of the intrusion here, balanced against the strong government interest at stake, suggests that substantially lesser grounds for suspicion than existed here would reasonably warrant an investigative stop. The ruling of the court below that the stop in this case was unreasonable sets an unrealistically difficult standard for an officer to meet. It will severely hamper the ability of officers to investigate suspicious circumstances and, in this context, will severely curtail the use of one of the government's most effective weapons in combating the illegal drug trade.

II. RESPONDENT'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED WHEN SHE AND THE AGENTS WENT FROM THE AIRPORT CONCOURSE TO THE NEARBY DEA OFFICE

In the preceding section we have contended that the initial encounter between the DEA agents and respondent in the airport concourse entailed no infringement of her Fourth Amendment rights. Assuming we are correct in this, the question remains whether a violation occurred when respondent and the agents went from the concourse to the nearby DEA office. The court of appeals in this case presumably adopted the conclusion of *McCaleb* that, regardless of the lawfulness of the initial encounter, the agents' request that the individual accompany them to the office converts the situation into an arrest requiring probable cause (see 552 F.2d at 720).

We submit that the conclusion that an illegal arrest or detention occurred at this point is in error on several grounds: First, the court failed to give due effect to the district court's finding that respondent voluntarily consented to go to the office; second, the court applied an incorrect standard for determining whether the conduct in question, even if not validated by a voluntary consent, constituted an arrest requiring probable cause; and third, viewing the change of situs as an extension of a lawful *Terry* seizure of respondent's person, the action was reasonable under the circumstances and therefore consonant with the Fourth Amendment.

A. Respondent's Voluntary Consent To Move To The DEA Office Obviates Any Fourth Amendment Objection That Might Otherwise Be Available

After looking at her driver's license and airline ticket, which revealed that respondent was traveling under an alias, Agent Anderson asked respondent if she would accompany him to a nearby office for further questioning, which she did. The district court specifically found that she accompanied the agents to the office "voluntarily in a spirit of apparent cooperation" (Pet. App. 16a). Thus, respondent voluntarily consented to any incremental intrusion in her freedom of movement that was entailed in going to the office.

In determining that the move from the concourse to the office constituted an arrest, the court of appeals did not disapprove—or even consider—the district court's finding of voluntary consent. While the

court's silence on the point makes it difficult to be certain why it failed to consider the consent, other decisions suggest that the Sixth Circuit considers the suspect's freedom to leave to be an overriding and dispositive factor.³⁵ Apart from the fact, as we next discuss (pages 48-50, *infra*), that an individual's freedom to leave is not dispositive of whether an arrest has occurred, there are several difficulties with the use of this factor as a basis for nullifying respondent's consent.

First, to the extent that the alleged illegality consists of moving the situs of the interview from the concourse to the DEA office, the relevant inquiry is not respondent's freedom to leave (either at the concourse or after arriving at the office), but her freedom to decline the request to move to the office. The court did not find that she was not free to refuse this request, and the record contains no evidence that would support such a finding.³⁶

³⁵ In *United States v. Smith*, 574 F.2d 882, 886 n.15 (6th Cir. 1978), the Sixth Circuit held, on similar facts, that a transfer to the DEA office was not an arrest because the subject went voluntarily. See also *United States v. Canales*, 572 F.2d 1182 (6th Cir. 1978). *McCaleb* was distinguished on the ground that the defendants there were not free to leave.

³⁶ Respondent's freedom to leave is relevant to the right of the officers to detain respondent at any point in the encounter, since the question whether there was any seizure of her person turns upon that factor. But at the point when she was asked to go to the office, by which time it was known that she was traveling under an assumed name, there can be little doubt that a reasonable suspicion of criminal activity existed justifying a *Terry* stop, with its concomitant lawful restriction on freedom of movement.

When a person voluntarily consents to an action by a police officer, that action is lawful under the Fourth Amendment without regard to the presence of a warrant, probable cause, or other substantive or procedural prerequisites to the search or seizure that the Fourth Amendment might command in the absence of consent.³⁷ Consequently, the change of situs here can be challenged as violative of the Fourth Amendment only if the district court's finding that respondent voluntarily consented to accompany the agents is clearly erroneous.

The question of the validity of a Fourth Amendment consent is ordinarily a question of fact to be determined by a consideration of the totality of the circumstances surrounding the consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). There is nothing in the record of this case that suggests that respondent's consent to go to the office was coerced in any way. Respondent herself did not testify at the hearing (Pet. App. 18a-19a). The government's evidence showed that respondent was not told that she would have to go, but was politely asked if she would accompany the officers. There were no threats or show of force. She had been subjected to only brief questioning before agreeing to accompany the agents. While the officers did testify that she was nervous, the totality of the evidence was plainly sufficient to sup-

³⁷ We assume in making this point that there is no claim that the consent is the fruit of an antecedent Fourth Amendment violation. Such a claim would raise a different issue, analogous to that addressed in Part III, *infra*.

port the district court's finding that her consent was the product of her own free will.³⁸

Second, and perhaps more fundamentally, the court's decision is premised upon an erroneous resort to the officers' subjective intentions for determining whether respondent was free to leave. There is testimony by Agent Anderson that, after respondent had agreed to go to the DEA office, the agents would not have permitted her to leave (A. 19). Given their well founded suspicion of criminal activity at that juncture, they would have been within their rights to restrain her; but even if they would not have been, it is not proper to rely on what the agents would have done had they not procured consent as a basis for determining the validity of the consent. An agent who knocks on the door of a house and asks for consent to search it manifestly does not act illegally in accepting a voluntarily given consent, even if he would have conducted the search without any consent. That is the teaching of *Scott v. United States*, 436 U.S. 128 (1978), and the line of cases that *Scott* follows. See note 17, *supra*. Accordingly, because the record here affords no basis for concluding that a reasonable person in respondent's situation would have felt compelled to accompany the agents to the office, the dis-

³⁸ *Dunaway v. New York*, *supra*, is not to the contrary, since the Court there relied upon the trial court's finding in holding that Dunaway was "taken involuntarily" to the police station (slip op. 3, 5, 6 n.6).

strict court's finding of voluntary consent is unassailable.³⁹

B. The Sixth Circuit's Standard For Determining Whether An Arrest Has Occurred Is Incorrect

The court in *McCaleb* concluded that even if the initial encounter there was a valid *Terry* stop, the agents' request that the individuals accompany them to a nearby private room converted the stop into an arrest requiring probable cause.⁴⁰ Specifically, the court held that when the individuals "were taken to the private office and were not free to leave, the arrest was clearly complete." 552 F.2d at 720. Wholly apart from the consent issue discussed above (pages

³⁹ The error of relying upon the agent's subjective intention (*i.e.*, on what would have happened had consent been withheld) as dispositive of the validity of the consent may be illustrated by the following hypothetical. Suppose the agent had not only asked the respondent if she would go to the office, but had specifically stated that she was free to refuse to do so. Suppose further that, having been so advised, she had nevertheless agreed to go. Surely her consent, if otherwise voluntary, would be unassailable in these circumstances—even if the agent had been lying when he told her she could refuse to go and in fact had every intention of taking her forcibly if she withheld consent.

⁴⁰ The term "arrest" may be used in different ways. Usually it refers to the formal act by which a person is charged with an offense and taken into custody for that offense. It is also used, however, as it is in this context, to refer to that degree of detention for which the Fourth Amendment requires probable cause, whether or not a formal charge is brought. See *Dunaway v. New York*, *supra*, slip op. 6-8.

43-47, *supra*), the Sixth Circuit's holding on this point is incorrect in two respects.

1. *Whether There Has Been an Arrest Requiring Probable Cause Does not Necessarily Depend on Whether a Detained Individual is Free to Leave*

In *Terry v. Ohio*, *supra*, the Court recognized the principle that certain police conduct may constitute a "seizure" under the Fourth Amendment yet not require probable cause. The Court left no doubt that such a "seizure" involves some restraint on the freedom of the individual to walk away. 392 U.S. at 16. As Justice White stated in his concurring opinion (392 U.S. at 34), "given the proper circumstances, * * * the person may be briefly detained against his will while pertinent questions are directed to him." See also *Brown v. Texas*, *supra*, slip op. 3. In fact, as we have argued above (Part I(A), *supra*), when an individual is free to leave an encounter with a police officer, that encounter is not a "seizure" that implicates the protections of the Fourth Amendment at all. The test that has commonly been applied in determining whether a given police encounter rises to the level of a *Terry* stop is whether a reasonable man would conclude that he was not free to leave the officer's presence. See, e.g., *United States v. Price*, *supra*, 599 F. 2d at 498; *United States v. Elmore*, *supra*, 595 F. 2d at 1041-1042; *United States v. Wylie*, *supra*, 569 F. 2d at 68.

The Sixth Circuit seems to analyze the question whether there has been an arrest in terms of the

degree to which an individual's freedom of movement is restrained,⁴¹ but this approach is unworkable. An individual is either free to go or he is not. The fact that an individual's freedom to leave during a detention in a private office for further questioning may be restrained, for a brief period, to the same extent that it would be if he were arrested does not imply that the detention requires probable cause. The severity of an intrusion must depend to a great extent on its expected duration, which is quite different in the case of a brief detention than in the case of an arrest. An arrest "is inevitably accompanied by future interference with the individual's freedom of movement." *Terry, supra*, 392 U.S. at 26. As one leading authority has stated:

The typical stopping for investigation cannot be viewed as anything but a complete restriction on liberty of movement for a time, and if investigation uncovers added facts bringing about an arrest, the early stages of the arrest will not involve any new restraint of significance * * *.

⁴¹ The court in *McCaleb* stated (552 F.2d at 720) (citations omitted):

Appellants were not free to leave at any point after the initial stop by the agents. As this court stated in *Manning v. Jarnigan*, 501 F.2d 408 (6th Cir. 1974), "[t]he difference between an investigatory stop and an arrest has yet to be spelled out . . . [However], this was clearly a deprivation of liberty under the authority of law. It does not take formal words of arrest or booking at a police station to complete an arrest." When appellants were taken to the private office and were not free to leave, the arrest was clearly complete.

A stopping for investigation is not a lesser intrusion, as compared to arrest, because the restriction on movement is incomplete, but rather because it is brief when compared with arrest, which (as emphasized in *Terry*) "is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows."⁴²

2. *Moving an Individual From the Location of a Terry Stop to a Nearby Office Does Not Necessarily Effect an Arrest*

A *Terry* stop based on reasonable suspicion not amounting to probable cause is constitutionally permissible because it is a lesser intrusion upon an individual's freedom than an arrest. As noted above, the most significant factor in determining whether a detention reaches the level of an arrest is its duration, which is completely within the control of the officer. The location of a stop, on the other hand, depends largely upon circumstances, relating to the officer's acquisition of a reasonable suspicion of criminal activity, that are typically not within the officer's control. Thus, if a *Terry* stop is made in the middle of a busy street, it will likely be necessary for the officer to move the individual to another location. Such a movement does not materially or unreasonably increase the intrusion or *ipso facto* convert it into an arrest requiring probable cause.⁴³

⁴² 3 LaFave, *supra*, § 9.2 at 29-30.

⁴³ The right of an officer to stop an individual on reasonable suspicion includes the right to use reasonable force in restraining the individual from departing. This is implicit in

This Court has recognized that an individual may legitimately be asked to make some movement from the location at which he is stopped, even if only for the convenience and safety of the officers, without any additional reason for suspicion other than the reasons that occasioned the stop. Thus, in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), an officer who had made a valid stop of the driver of an automobile could legitimately order the driver to get out of the car. Similarly, in *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976), the Court held that cars passing through a highway checkpoint could be selectively directed to a secondary inspection area, even without any reason for suspicion at all. Clearly, a minor movement of an individual from the location

the idea of a "forcible stop." See *Adams v. Williams*, *supra*, 407 U.S. at 147; *Terry*, *supra*, 392 U.S. at 32 (Harlan, J., concurring). The ALI Model Code provides for the "use [of] such force, other than deadly force, as is reasonably necessary to stop any person or vehicle or to cause any person to remain in the officer's presence." The reason for allowing the use of such force is that "it would be frustrating and humiliating to the officer to grant him an authority to order persons to stop, and then ask him to stand by while his order is flouted." ALI Model Code, *supra*, § 110.2(3) and commentary at 284-285. The courts generally have adopted the same position. See *United States v. Thompson*, 558 F.2d 522 (9th Cir. 1977); *United States v. Purry*, 545 F.2d 217 (D.C. Cir. 1976); *United States v. Worthington*, 544 F.2d 1275 (5th Cir. 1977); *United States v. Richards*, 500 F.2d 1025 (9th Cir. 1974); *United States v. Lee*, 372 F. Supp. 591 (W.D. Pa. 1974). In a situation where the use of some force may be proper, it is illogical to maintain that the removal of an individual to a nearby office, without force, is *per se* improper.

at which he is stopped cannot *per se* convert the stop into an arrest. As the Court said in *Mimms*, “[t]he touchstone of our analysis under the Fourth Amendment is always ‘the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.’” 434 U.S. at 108-109.

Of course, the fact that an arrest requiring probable cause cannot be found simply upon the basis that a detained suspect has been moved to another location does not answer the question whether what transpired in any given case may have been sufficiently intrusive to amount to an arrest or may otherwise have been unreasonable or unjustified under the Fourth Amendment. It is to these case-specific questions that we now turn.

C. Moving Respondent To A Nearby Office Was Reasonable In The Circumstances Of This Case

Even assuming that respondent’s consent to go to the office was not effective, the move was reasonable under the circumstances and did not violate respondent’s Fourth Amendment rights. As we have argued above (pages 26-42, *supra*), any “seizure” of respondent in connection with the initial questioning in the airport concourse was lawful because of the reasonable suspicion that she might be carrying drugs. Because a “seizure” of respondent was proper, and resort to the warrant procedure impossible, the Fourth Amendment inquiry pertinent at this juncture is whether the nature of that seizure—here, specifically, the transfer to the DEA office—was unreasonable. See *Terry, supra*, 392 U.S. at 19-20. The

inquiry here ~~thus~~ "must therefore focus not on the intrusion resulting from the request to stop * * * but on the incremental intrusion resulting from the request to [accompany the agents to the office] once [respondent] was lawfully stopped." *Pennsylvania v. Mimms, supra*, 434 U.S. at 109. The incremental intrusion resulting from a transfer of an individual may, in some cases, be unreasonable unless it is supported by probable cause, even if the individual is not technically placed under arrest. See *Dunaway v. New York, supra*. The transfer in this case, however, does not approach the level of intrusiveness of the transfer in *Dunaway*, and it was reasonable under the circumstances.

Since *Terry v. Ohio, supra*, it has been established that an individual may be stopped on facts that do not constitute probable cause, for the purposes of a brief investigation of suspicious circumstances. See *United States v. Brignoni-Ponce, supra*, 422 U.S. at 881. *Terry* stated that the central Fourth Amendment inquiry in the case of such a governmental intrusion that is not a "technical arrest" is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." 392 U.S. at 19. See also *Mimms, supra*, 434 U.S. at 109. The focus of this inquiry is a "balancing test" (see *Dunaway, supra*, slip op. 8), whether "the scope of the particular intrusion" is justified "in light of all the exigencies of the case." 392 U.S. at 18 n.15. In addition, the stop must be "reasonably related in scope to the circumstances which justified the

interference in the first place." *Terry, supra*, 392 U.S. at 20.

In *Pennsylvania v. Mimms, supra*, the Court found that the increased degree of safety for the officer occasioned by requiring the driver to get out of his car warranted the additional intrusion into the driver's personal liberty. The Court concluded (434 U.S. at 111; footnote omitted):

We think this additional intrusion can only be described as *de minimis* * * *. The police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it. Not only is the insistence of the police on the latter choice not a "serious intrusion upon the sanctity of the person," but it hardly rises to the level of a "petty indignity." *Terry v. Ohio, supra*, at 17. What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety.

Comparing the action in this case to that in *Mimms*, the removal of a suspect to a private office approximately 50 feet away may or may not be a greater inconvenience than ordering a driver to get out of his car, depending on the circumstances.⁴⁴ In any event,

⁴⁴ The fact that the distance traveled in walking to the airport office is greater than that traveled in stepping out of a car does not alone establish that the former is a greater intrusion. A driver may be asked to step out of his car in inclement weather or at the side of a busy highway where his proximity to fast-moving traffic may make him quite uneasy. The driver of a car expects to remain in his car, and to make

the Court in *Mimms* suggests that a greater intrusion than the one involved there, characterized as "a mere inconvenience," would be permissible if the intrusion were balanced against other important considerations. The transfer here is supported by policy reasons that are as persuasive as the safety factor in *Mimms* and that cannot be vindicated in a less intrusive fashion. First, any contact with a suspected drug courier carries a potential for danger. Moving the suspect out of the terminal area lessens the danger of injury to the public that could result from a confrontation and any danger to the officers that might arise from the presence at the airport of unknown confederates of the detained person.⁴⁵ Second, speaking and listening

him get out is an intrusion. An individual who has just gotten off an airplane, however, does not expect to remain stationary; he would no doubt expect to walk considerably more than 50 feet before eventually leaving the airport.

⁴⁵ In his dissenting opinion below Judge Weick stated (Pet. App. 5a) that "[t]he reason [for such a request] is that the agent must comply with airport regulations which are designed to prevent public confrontation and injury [to the public] which may result therefrom." As a factual matter, there are no airport regulations as such that control DEA conduct in this regard. Judge Weick was probably referring to the testimony of DEA Agent Paul Markonni in *United States v. Camacho*, No. 78-5081 (October 18, 1978), which was briefed and argued in the court of appeals as a companion case to this one. Agent Markonni testified during the suppression hearing in *Camacho* that Detroit airport authorities had requested the DEA to conduct its questioning of suspects and any searches away from the public areas of the terminal in order to ensure the safety of the public and to prevent embarrassment to the individuals detained.

in a noisy airport terminal is difficult for both the officer and the person detained; a conversation can best be conducted in a location free from such distractions. Third, the officers, who often patrol the same airport, have an interest in not attracting attention to themselves in the terminal. Finally, conducting the investigation away from public areas of the terminal prevents any unnecessary embarrassment to the person detained.⁴⁶ This is especially relevant where, as here, the initial questioning by the agents heightens their suspicion to such a degree that they deem it appropriate to request the individual's permission to search his luggage or his person.⁴⁷ We submit that these concerns are ample justification for the minimal intrusion involved here in moving an in-

⁴⁶ See generally *United States v. Chatman*, 573 F.2d 565, 567 (9th Cir. 1977) ("it was not improper * * * to arrange that [the interrogation of a suspect stopped in the airport] take place free from public view with its attendant embarrassment"); *United States v. Oates*, *supra*, 560 F.2d at 57 (proper to move suspects into a nearby office, a place more conducive to insuring the safety of other passengers in the crowded departure area); *United States v. Van Lewis*, *supra*, 409 F. Supp. at 545 ("There are many cogent reasons for not interrogating travelers in the hustle and bustle of the airport's public areas. These involve the safety of both parties, the ability to converse effectively, the embarrassment to the person detained, and others.").

⁴⁷ The Sixth Circuit has recognized that requesting consent to search is permissible police conduct during a lawful *Terry* stop. See *United States v. Smith*, *supra*, 574 F.2d at 886 n.15 (6th Cir. 1978). The Sixth Circuit's objection to the consent search in this case derives solely from the premise that there was an unlawful detention.

dividual from the concourse to a nearby office. No further cause for suspicion is necessary beyond that which justified the stop.⁴⁸

The circumstances of this particular case provide further justification for the action of the agents in moving the location of the interview to the office. When they began to question respondent in the airport terminal, the agents immediately discovered that she was traveling under an alias, for which she gave no satisfactory explanation. The agents also discovered that respondent had been in California for only two days, an unusually short stay. These facts heightened the agents' already reasonable suspicion that respondent was carrying drugs. At this point, one agent identified himself as a narcotics agent and observed that respondent thereupon became extremely nervous. Only then did the agents request respondent to accompany them to the DEA office. The entire encounter with the agents, from the time respondent was approached until she consented to the search in the office, took only 5 to 6 minutes.

⁴⁸ See, e.g., *United States v. Wylie*, *supra*, 569 F.2d at 69-71, in which the court stated that a police officer who had stopped an individual because of his strange behavior inside a nearby bank, could compel the suspect to re-enter the bank for purposes of making a brief investigation. See also ALI *Model Code of Pre-Arrest Procedure* § 110.2(1) (Proposed Official Draft, 1975), which provides that during a *Terry* stop an officer may "order a person to remain in the officer's presence [or] near such place * * *." As the draftsmen explained, the concept is intended to be flexible, and gives the officer the authority to order a person stopped on the street to a nearby place, such as the officer's patrol car or police call box.

The determination that the move to the DEA office did not give rise to an arrest requiring probable cause is consistent with this Court's decision in *Dunaway v. New York*, *supra*. In *Dunaway*, on the basis of a lead that suggested Dunaway's involvement in a murder but did not establish probable cause to arrest, three police detectives were ordered to "pick up" Dunaway and "bring him in." The detectives located Dunaway at a neighbor's house, placed him in a police car, and drove him to police headquarters. Although he was not told that he was under arrest, he was placed in an interrogation room, where he was questioned by officers after having been advised of his *Miranda* rights.

Even though Dunaway had not been formally arrested, the Court ruled that his detention violated the Fourth Amendment because it was not supported by probable cause. *Dunaway* thus makes clear that some intrusions upon the freedom of an individual are of such a magnitude that they require probable cause under the Fourth Amendment, whether or not they are technical arrests. As was recognized in *Dunaway*, however, other seizures within the purview of the Fourth Amendment, analogous to the intrusions in *Terry* and its progeny, do not require probable cause. Slip op. 11.

The limited intrusion resulting from the movement to the office in this case does not approach the magnitude of the intrusion in *Dunaway* and was clearly reasonable under the circumstances. First, the respective justifications for the two intrusions were

quite different. Respondent was subjected to a lawful *Terry* stop in a public area for brief questioning because her conduct aroused the suspicion of trained agents. The agents had to act quickly, or else the opportunity to prevent respondent from successfully completing her delivery of drugs would have been gone. The agents did not request that respondent come to the office until they had asked her a few questions that heightened their suspicions, and, moreover, there were important safety and other reasons for requesting her to move to the nearby office. In contrast, the police in *Dunaway* acted on a tip; there was no need to question him at any particular time and no reason not to question him at his neighbor's house. Yet, as the Court found significant, he was not "questioned briefly where he was found" (slip op. 11), but was immediately seized and taken to the station.

The physical move in *Dunaway*—involving a drive to the police station rather than walking a few feet—was much more intrusive than the one here. *Dunaway* was also detained for an hour before the police even began to question him. *People v. Dunaway*, 61 App. Div. 2d 299, 302, 402 N.Y.S. 2d 490, 492 (1978). The psychological impact of being herded into a police car, taken to police headquarters, and placed in an interrogation room is quite severe, as compared to simply being asked to step from a busy airport concourse into a nearby private room.

Finally, the character and duration of the intrusions were quite different. *Dunaway* clearly involved

a "custodial interrogation." Dunaway was taken to an interrogation room at the station, given *Miranda* warnings, and questioned for about an hour (see slip op. 6 (Rehnquist, J., dissenting); *People v. Dunaway*, *supra*, 61 App. Div. 2d at 303, 402 N.Y.S. 2d at 493 (Denman, J., concurring)) before he made an incriminating statement. Here, the questioning was conversational, rather than in the nature of an interrogation, and was quite brief, amounting to a total of only five or six minutes including the questioning on the concourse.

As we have noted above, a critical feature of a detention that often determines its intrusiveness is its duration. See 3 LaFave, *supra*, § 9.2 at 30-31. See also *United States v. Brignoni-Ponce*, *supra*, 422 U.S. at 880. A *Terry* stop is valid only when it is for the purpose of a brief investigation of the suspicious circumstances. The ALI Model Code *supra*, § 110.2(1) suggests 20 minutes as a standard for the appropriate length of a *Terry* stop, but the exact duration that converts a *Terry* stop into an intrusion so substantial as to require probable cause may vary, depending upon the circumstances, and must be determined on a case-by-case basis. This case, however, does not present a close question on this issue. Although the two hour detention in *Dunaway* (which might have continued indefinitely if Dunaway had not made an incriminating statement) was a detention equivalent to an arrest and requiring probable cause, it is clear that the six minute detention in this case did not rise to such a level. In sum, *Dunaway* does not estab-

lish that the agents' conduct in moving respondent was improper.

Both the Ninth and Second Circuits have concluded that moving an individual from an airport terminal to a nearby room does not constitute an arrest. *United States v. Chatman*, 573 F. 2d 565, 567 (9th Cir. 1977); *United States v. Nieves*, No. 79-1051 (2d Cir. October 30, 1979); *United States v. Oates*, *supra*. Other courts have recognized the propriety of similar movements in other contexts.⁴⁹ Clearly, a *per se* rule that a *Terry* stop is converted into an arrest whenever an individual is moved from the location at which he is stopped cannot be maintained. In certain cases, movement is almost unavoidable—for example, when a suspect stopped by the police in the middle of a large and hostile crowd is moved to a safer place for questioning. Other movements, such as the one in *Dunaway*, are unnecessary and improper. The test must be the reasonableness of the

⁴⁹ See *United States v. Short*, 570 F.2d 1051, 1054 (D.C. Cir. 1978) (pursuant to a *Terry* stop, suspect may be taken to nearby scene of burglary for possible identification); *United States v. Wylie*, *supra*, 569 F.2d at 70 (officer who made *Terry* stop on street outside bank could take suspect back into bank for questioning); *United States v. O'Looney*, 544 F.2d 385, 389 (9th Cir.), cert. denied, 429 U.S. 1023 (1976) (reasonable to move suspect to station for brief detention while awaiting the arrival of more experienced agents); *United States v. Salter*, 521 F.2d 1326, 1328-1329 (2d Cir. 1975) (suspect stopped at bus station could be taken to nearby baggage room for questioning); *People v. Stevens*, 183 Colo. 399, 407, 517 P.2d 1336, 1340 (1973) (proper to take a suspect stopped in prison lobby to nearby conference room for questioning).

movement in the circumstances of the case. In this case, the agents' action in moving respondent to a nearby office was reasonable, apart from her voluntary consent to go there.

III. RESPONDENT EFFECTIVELY CONSENTED TO THE SEARCH OF HER PERSON, REGARDLESS OF THE LEGALITY OF HER DETENTION

In concluding that respondent gave "no valid consent to search within the meaning of *McCaleb*," the court below apparently relied solely on the theory that the otherwise voluntary consent was a "fruit of the illegal arrest." 552 F.2d at 721. As the court did not discuss the particular facts of this case, which were quite different from those in *McCaleb*,⁵⁰ it apparently has concluded that a voluntary consent to search can never be effective if the preceding detention is unlawful. Such a *per se* rule is at odds with the decisions of this Court in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), and *Brown v. Illinois*,

⁵⁰ Three factors other than the unlawful detention were relied on by the court in *McCaleb* to invalidate the consent there, but are absent here. These factors were the agent's statement, in response to *McCaleb*'s query as to what would happen if he refused consent, that the agent would attempt to obtain a warrant; the fact that *McCaleb* merely unlocked the suitcase but did not open it himself; and the fact that *McCaleb* did not orally acquiesce in the search. 552 F.2d at 721. Here, in contrast, respondent was not led to believe that she would be further detained if she refused to consent, she twice verbally consented to the search (A. 12, 24), and she handed the packages of heroin to the policewoman conducting the search.

422 U.S. 590 (1975).⁵¹ If this Court concludes that we are mistaken in our belief that respondent's consent was given at a time when she was not being illegally detained, and hence goes on to consider whether her consent was invalid as the "fruit" of an illegal detention, we submit that respondent's consent was valid and effective to attenuate any antecedent taint. It was freely and voluntarily given under the standards of *Schneckloth* and was not obtained through an exploitation of an illegal detention under the standards of *Brown*.

A. Respondent's Consent Was Voluntary

The essential facts here are undisputed. After respondent agreed to accompany the agents to the nearby office, she was asked if she would consent to a search of her person and her handbag, and she was advised that she had the right to decline the search if she so desired. Respondent verbally consented to the search. Following the search of her purse, which disclosed additional suspicious information but no contraband, a female police officer arrived to search respondent's person. Before the policewoman searched respondent, she again asked respondent if she consented to the search, and respondent replied that she did.

⁵¹ The Court stated in *Brown* (422 U.S. at 603): "we also decline to adopt any alternative *per se* or 'but for' rule. * * * The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case." See also *Almeida-Sanchez v. United States*, 413 U.S. 266, 268, 273 (1973) (implying that a search by consent would be valid after a stop without reasonable suspicion).

The district court found (Pet. App. 16a) that respondent's consent was "freely and voluntarily given" under the standards established in *Schneckloth v. Bustamonte*, *supra*. There is no basis in the record for disturbing this finding (nor did the court of appeals purport to do so). The *Schneckloth* inquiry focuses on whether, in light of "the totality of the circumstances," the consent is truly voluntary or it is instead induced by duress or coercion. In this case, only five or six minutes transpired from the time respondent was approached until she consented to the search. She was 22 years old with an eleventh grade education and thus certainly capable of a knowing consent (A. 13). She was no stranger to law enforcement procedures, having been arrested twice before. No threats were made to induce her consent; on the contrary, she was twice notified of her right to refuse.⁵² The fact that she was in the DEA office when she consented, although a factor to be considered, does not necessarily imply that her consent was coerced.⁵³ In *United States v. Watson*, 423 U.S.

⁵² Upon being told that the search would require the removal of her clothes, respondent stated to the female police officer that "she had a plane to catch" (A. 24). This would seem to indicate nothing more than a concern that the search be made quickly. Respondent had already twice consented unequivocally to the search and, after the policewoman assured her that if she did not have anything on her there would be no problem, respondent disrobed without further ado.

⁵³ See, e.g., *United States v. Vasquez-Santiago*, Nos. 78-1418, 78-1419 (2d Cir. July 12, 1979), slip op. 3697, petition for cert. pending, No. 79-5197. Respondent has alleged (Br. in Opp. 14 n.7) that the record indicates the inherent coer-

411, 424-425 (1976), this Court held that a valid consent to search can be given even while a person is under arrest. The totality of the circumstances clearly indicates that respondent's consent was voluntary under *Schneckloth*, as the district court found.

B. Respondent's Consent Is Not Invalid As A "Fruit" Of An Illegal Detention.

In *Wong Sun v. United States*, 371 U.S. 471 (1963), it was established that evidence obtained after an illegal arrest or search may be suppressed under certain circumstances as the "fruit of the poisonous tree." The Court explained, however, that the relevant inquiry is not one of "but-for" causation, stating (*id.* at 487-488; citation omitted):

We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not

civeness of the office setting in that the policewoman testified (A. 26) that none of the ten women she had searched in the preceding two years had refused consent to the search. This fact is hardly surprising, and quite irrelevant, because the policewoman was not called in until after respondent consented to be searched in response to the agent's request (A. 12), and there is no basis for supposing that she would be called to search suspects who had not consented.

In fact, the evidence indicates that the office was not a setting that would make an individual feel compelled to consent to a search. The office does not resemble an interrogation room, but is a suite containing four rooms (A. 20-21). Moreover, the limited number of reported cases originating from narcotics arrests at the Detroit airport demonstrate that individuals do refuse to consent to search in the DEA office, even where they have not been warned of their right to refuse. See *United States v. Van Lewis*, *supra*, 409 F. Supp. at 540.

have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

In *Brown v. Illinois, supra*, the Court dealt with the question of the validity of a voluntary act, a confession, by a person who was being illegally detained. Three officers, acting without probable cause, broke into Brown's apartment at night, searched the apartment, and arrested Brown at gunpoint when he arrived. Brown was searched, handcuffed, and taken to the police station, where he was advised of his *Miranda* rights. Under interrogation at the stationhouse, Brown signed a statement admitting his participation in a murder. The Court concluded that Brown's confession was tainted by the illegality of his arrest and therefore not admissible in evidence, rejecting the State's contention that the *Miranda* warnings, by themselves, assured that Brown's confession was sufficiently an act of free will so as to purge the primary taint of the unlawful arrest.

Brown does not suggest, however, that a consent to search should necessarily be considered a "fruit" of an illegal detention. First, the Court in *Brown* relied on the fact that *Miranda* warnings are not a means of either "remedying or deterring violations of Fourth Amendment rights." 422 U.S. at 601. Thus when the officers gave Brown *Miranda* warn-

ings, they protected him against violation of his Fifth Amendment rights but did not address or protect him against violations of the Fourth Amendment. Therefore it was held that the *Miranda* warnings could not automatically remove the taint of the arrest. The Court ruled that "*Wong Sun* thus mandates consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment." 422 U.S. at 602.

In this case, unlike *Brown*, the consent to a search constitutes an agreement to accept an intrusion that may otherwise be barred by the Fourth Amendment. The policies of the Fourth Amendment are considered in determining the voluntariness of that consent. Thus *Brown*, characterized by the Court as a "limited" holding that decided only that *Miranda* warnings alone do not necessarily purge the taint of an illegal arrest from a confession (422 U.S. at 605), does not imply that a consented-to search must be considered a "fruit" of an illegal detention.

Second, application of the principles of attenuation set forth in *Brown*, and a comparison of the facts in this case with those in *Brown*, clearly establish the validity of the consent here. Initially, it should be noted that the violation alleged here, involving a brief detention, is considerably less intrusive than the illegal break-in, arrest, and detention at the police station involved in *Brown*. A lesser degree of attenuation should be necessary to purge the taint where the Fourth Amendment violation is less intrusive.

Not only did respondent twice consent to the search, but she did so after having been explicitly advised of her right to refuse her consent. This warning of a right to refuse, which is not required under *Schneckloth* for a finding of voluntariness, is an event that should properly be viewed as having broken "the causal connection" between any prior illegality and the eventual search. See *Dunaway v. New York*, *supra*, slip op. 16. Respondent was simply informed that she had a decision to make, whether to permit a search or not. This decision was independent of the preceding events (except in the but-for sense that she might not have been there to be asked, which cannot be dispositive). It is hard to imagine an action less calculated to exploit an illegal detention than prefacing a request for consent to search, as the officers did, with the advice that the consent could be refused. This advice necessarily erased any belief respondent might have had that she was expected or required to consent to a search in light of her detention. Permitting such a possible belief to persist would have been a method of exploiting the fact of detention to the agents' advantage, but they chose not to do so.

The notification of the right to refuse consent here is an intervening event of greater significance than the *Miranda* warnings in *Brown*. *Miranda* warnings are a constitutional prerequisite to interrogation that produces an admissible confession, while notification of a right to refuse consent to a search is not a constitutional prerequisite to a voluntary consent under *Schneckloth*. Moreover, the *Miranda* warnings in

Brown could not logically have been treated as an intervening event of great significance.⁵⁴ Even if his detention had been lawful, *Brown* would have to have been given *Miranda* warnings in order for his confession to be admissible. Thus, if the Court had held in *Brown* that the *Miranda* warnings sufficed to remove the taint of the illegal arrest, it would have eviscerated the doctrine of *Wong Sun* with respect to confessions.

Such a decision would have reduced the analysis of a confession obtained during an illegal detention to a black-and-white question. If *Miranda* warnings had been given, the confession would not be invalidated despite the illegality of the detention; if no *Miranda* warnings had been given, the confession would be invalid under *Miranda*. The *Wong Sun* doctrine would have no place in the analysis, and, therefore, the admissibility of a confession obtained following a Fourth Amendment violation would be determined without any reference at all to the policies and interests of the Fourth Amendment. In contrast, the notification of the right to refuse consent in this case, which was not constitutionally required, was indeed a significant intervening event—one that negates the

⁵⁴ *Brown* itself, however, does seem to contemplate that, in some cases, even a *Miranda* warning could serve to attenuate the taint of an illegal detention (422 U.S. at 603) (emphasis added): "[T]he *Miranda* warnings, alone and *per se*, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited."

hypothesis that the consent was an exploitation of the detention. The giving of a warning that is not required is simply inconsistent with an intent to exploit.⁵⁵

In addition to the existence of a significant intervening event breaking the causal connection, *Brown* discusses other factors to be considered in determining whether the taint has been purged. In this connection the Court gave particular emphasis to the purpose and flagrancy of the official misconduct (422 U.S. at 604). As we have argued above, we believe the agents acted lawfully in briefly questioning respondent and seeking her consent to search, as did the district court and the dissenting judge on the court of appeals. If, in fact, the agents' conduct constituted a seizure that exceeded the scope of a permissible *Terry* stop, it did so only marginally.

⁵⁵ The Fifth Circuit has held that, in the absence of additional coercive factors, advising a suspect of his right to withhold consent to search dissipates any taint arising from the illegality of his detention. See *United States v. Troutman*, 590 F.2d 604 (5th Cir. 1979) (airport detention); *United States v. Fike*, 449 F.2d 191 (5th Cir. 1971); *Bretti v. Wainwright*, 439 F.2d 1042 (5th Cir.), cert. denied, 404 U.S. 943 (1971); *Phelper v. Decker*, 401 F.2d 232 (5th Cir. 1968). See also *United States v. Race*, 529 F.2d 12, 15 (1st Cir. 1976) (defendant's voluntary consent to search not an exploitation of a prior, assumedly illegal, search; defendant's consent, once obtained, provided a means of coming at the evidence that was sufficiently distinguishable to be purged of the primary taint). Cf. *United States v. Bazinet*, *supra*. Compare *United States v. Vasquez-Santiago*, *supra*, slip op. 3697, with *United States v. Ruiz-Estrella*, 481 F.2d 723, 728 (2d Cir. 1973).

The agents' conduct in this case cannot be characterized as flagrant. In contrast to *Brown*, where the officers broke into the defendant's apartment and arrested him at gunpoint without even a hint of probable cause, the conduct here was exemplary.⁵⁶ The decision to approach and question respondent was made by agents who believed, based on their years of experience and special training in the detecting of drug couriers, that respondent was likely to be carrying drugs. Only when initial questioning of respondent heightened the agents' suspicion did they politely request her to accompany them to a nearby office, which respondent willingly did. Inside the office they requested permission to search respondent's purse and person and advised her of her right to refuse.⁵⁷ The search occurred only after respondent

⁵⁶ In *Dunaway v. New York*, *supra*, while the conduct of the police was less offensive in certain respects than that in *Brown*, the scope of the seizure of the defendant's person was similar in magnitude, and, as in *Brown*, it was clear that probable cause did not exist; indeed, the Court described the circumstances of the case as "virtually a replica of the situation in *Brown*." Slip op. 17. The flagrancy of the police conduct in *Brown* and *Dunaway* was a factor weighing against a finding of attenuation there that is absent here.

⁵⁷ The Court has characterized consent searches as "valuable" and has encouraged law enforcement officials to rely upon them (*Schneckloth*, *supra*, 412 U.S. at 227-228):

In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. * * * In short, a search pursuant to consent may result in considerably less inconvenience for the

twice gave her consent. Respondent was not subjected to a prolonged or intense interrogation, or to any form of duress. Thus the intrusion, if any, on respondent's constitutionally protected rights was quite limited. Finally, nothing in the circumstances of this case suggests that the officers deliberately acted in excess of their lawful authority.⁵⁸

The other factor listed in *Brown* as relevant to the attenuation inquiry is the temporal proximity of the illegality to the acquisition of the evidence. This factor has been described as "usually the least influential element of attenuation analysis." *United States v. Crews*, 389 A.2d 277, 297 (D.C. Ct. App. 1978), cert. granted, No. 78-777 (argued October 31, 1979). See also *Dunaway, supra*, (Stevens, J., concurring); 2 LaFave, *supra*, § 11.4 at 633. It can be a significant factor when the evidence is obtained some time after the illegality has ceased. See, e.g., *Wong Sun, supra*. In this case, however, the consent was given while the alleged illegal detention was still continuing, and we do not contend that lack of temporal proximity is an attenuating factor.⁵⁹

subject of the search, and, properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity.

⁵⁸ The encounter involved in this case occurred well before the Sixth Circuit's decision in *McCaleb*. We are not aware of any appellate decisions at the time that should have suggested to the agents that their conduct might be unlawful.

⁵⁹ A fourth factor considered by the court in *Brown* was the existence of *Miranda* warnings. This factor was relevant there because the evidence in question was a confession, but

In sum, application of the principles of attenuation established in *Wong Sun* and *Brown* leads to the conclusion that respondent's consent was not tainted by any illegality in her detention. This conclusion is consistent with the policies of the exclusionary rule. An agent who observes suspicious behavior at an airport and believes that further investigation is warranted must act quickly. No purpose is served by excluding evidence discovered during a search consented to by a suspect, after being advised of his right to refuse, on those few occasions when it is later determined that the agent did not have sufficient cause to stop the suspect. Exclusion of the evidence, however, could seriously hamper the efforts of law enforcement officials to stem the dangerous and debilitating traffic in illegal drugs in this country.

it has no application here, where the evidence was obtained by a consent search and the Fifth Amendment is not implicated. *Miranda* warnings are not a prerequisite to a valid consent to search. See, e.g., *United States v. Lemon*, 550 F.2d 467, 472 (9th Cir. 1977) ; *United States v. Garcia*, 496 F.2d 670, 674-675 (5th Cir. 1974), cert. denied, 420 U.S. 960 (1975). The analogy to a *Miranda* warning in this context is a voluntary consent or a warning of the right to refuse consent, which, as discussed above, more strongly implies the attenuation of any Fourth Amendment taint than does a *Miranda* warning.

CONCLUSION

The judgment of the court of appeals should be reversed.

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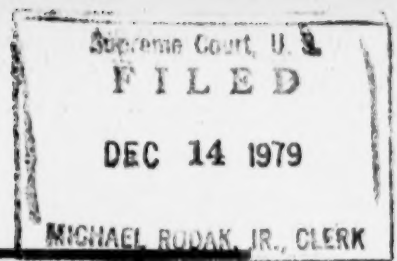
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NOVEMBER 1979





IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 78-1821

UNITED STATES OF AMERICA,
Petitioner,

v.

SYLVIA MENDENHALL,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

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(i)

INDEX

	<i>Page</i>
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT	2
SUMMARY OF ARGUMENTS	12
ARGUMENT--	
I. DEFENDANT WAS ARRESTED WITHIN THE MEANING OF THE FOURTH AMENDMENT WHEN SHE WAS SEIZED WITHOUT PROBABLE CAUSE BY FEDERAL AGENTS IN A ROOM WITHIN A PRIVATE LOCKED DEA OFFICE IN AN AIR- PORT FOR THE PURPOSE OF OBTAINING A SEARCH OF HER PERSON.	17
A. The Detention of Defendant Re- quired Probable Cause Before Her Interests of Privacy and Personal Security Gave Way.	17
B. The Point of Arrest Requiring Prob- able Cause Occurs When the Detention Deprives a Citizen of Liberty Within the Meaning of the Fourth Amend- ment.	23
II. THE DETENTION AND SEARCH OF DEFENDANT CANNOT BE JUS- TIFIED UNDER THE LAW OF IN- VESTIGATORY STOPS WHERE FEDERAL AGENTS KNEW ONLY THAT DEFENDANT (1) WAS ON A FLIGHT FROM LOS ANGELES TO DETROIT, (2) WAS THE LAST PASSENGER TO GET OFF THE AIRPLANE, AND (3) UPON DE-	

(ii)

PLANING APPEARED NERVOUS TO THE FEDERAL AGENT AND LOOKED AROUND THE AREA WHERE AGENTS WERE STAND- ING.	31
A. There Was No Reasonable Suspicion Within the Meaning of the Fourth Amendment to Permit an Investiga- tory Stop of Defendant.	31
B. The Seizure Without Reasonable Suspicion Was Complete and Defen- dant's Liberty Was Restrained When She Was Required to Give Federal Agents Her Driver's License Which Was Held by the Agents While De- fendant Was Required to Continue to Answer Questions and Thereafter Required to Give Federal Agents Her Airplane Ticket.	38
C. The Drug Courier Profile Does Not Overcome Defendant's Fourth Amend- ment Protections.	41
D. The Degree of Restraint Imposed on Defendant Exceeded That Permissible in an Investigatory Stop.	48
E. The Fourth Amendment Does Not Allow Intrusions upon Free Passage and Personal Security Through Un- fettered Police Discretion.	48
III. THE CONSENT TO SEARCH GIVEN BY DEFENDANT WAS INVALID WHERE THE CONSENT WAS NOT VOLUNTARY AND WAS THE PRO- DUCT OF AN ILLEGAL DE- TENTION	49
A. The Alleged Consent Was Not Freely and Voluntarily Given.	50
B. The Alleged Consent Was the Product of an Illegal Detention.	54

(iii)

C. The Court of Appeals Correctly Held That the Alleged Consent Was Invalid.	56
CONCLUSION	58

CITATIONS

Page

Cases:

<i>Adams v. Williams</i> , 407 U.S. 143 (1972)	19
<i>Bowers v. State</i> , # 57355 (Ga. App. 6/28/79)	42
<i>Brown v. Illinois</i> , 422 U.S. 590 (1975)	17,50,54,55,57
<i>Brown v. Texas</i> , — U.S. —, 99 S.Ct. 2637 (1979)	14,18,38,40
<i>Bumper v. North Carolina</i> , 391 U.S. 543 (1968)	15,50
<i>Carrol v. United States</i> , 267 U.S. 132 (1925)	49
<i>City Messenger Service of Hollywood, Inc. v.</i> <i>Capitol Records Distributing Corp.</i> , 446 F.2d 6 (6th Cir. 1971)	34
<i>Coates v. United States</i> , 413 F.2d 731 (D.C. Cir. 1969)	25
<i>Davis v. Mississippi</i> , 394 U.S. 721 (1969)	45
<i>Dunaway v. New York</i> , — U.S. —, 99 S.Ct. 2248 (1979)	<i>passim</i>
<i>Genner v. Sparks</i> , 91 Eng. Rep. 74 (C.P. 1704)	24
<i>Henry v. United States</i> , 361 U.S. 98 (1959)	13,24,26
<i>Marshall v. Barlow's Inc.</i> , 436 U.S. 307 (1978)	40
<i>Michigan v. Tyler</i> , 436 U.S. 499 (1978)	40
<i>Mincey v. Arizona</i> , 437 U.S. 385 (1978)	40
<i>Pennsylvania v. Mimms</i> , 434 U.S. 106 (1977)	20

<i>People v. Gonzales,</i> 356 Mich. 247, 97 N.W.2d 16 (1959)	25
<i>People v. Ulrich,</i> 83 Mich. App. 19, 268 N.W.2d 269 (1978)	25
<i>Peters v. New York,</i> 392 U.S. 40 (1968)	24
<i>Schneckloth v. Bustamonte,</i> 412 U.S. 212 (1973)	<i>passim</i>
<i>Sibron v. New York,</i> 392 U.S. 40 (1968)	13,26,27,48
<i>Smith v. United States,</i> 385 F.2d 833 (D.C. Cir. 1966)	9
<i>Terry v. Ohio,</i> 392 U.S. 1 (1968)	<i>passim</i>
<i>United States v. Allen,</i> 421 F. Supp. 1379 (E.D. Mich. 1976)	7,41,42
<i>United States v. Andrews,</i> 600 F.2d 563 (6th Cir. 1979)	<i>passim</i>
<i>United States v. Ballard,</i> 573 F.2d 913 (5th Cir. 1978)	37,41,42
<i>United States v. Beck,</i> 598 F.2d 497 (9th Cir. 1979)	25
<i>United States v. Brignoni-Ponce,</i> 422 U.S. 873 (1975)	<i>passim</i>
<i>United States v. Brunson,</i> 549 F.2d 348 (5th Cir. 1977)	25
<i>United States v. Bryant,</i> 406 F. Supp. 635 (E.D. Mich. 1975)	7,56
<i>United States v. Camacho,</i> 596 F.2d 706 (6th Cir. 1979)	11,28,30,41,56
<i>United States v. Canales,</i> 572 F.2d 1182 (6th Cir. 1978)	<i>passim</i>
<i>United States v. Carrizosa-Gaxiola,</i> 523 F.2d 239 (9th Cir. 1975)	43

<i>United States v. Ceccolini</i> , 435 U.S. 268 (1978)	55
<i>United States v. Chaffin</i> , 587 F.2d 920 (8th Cir. 1978)	25
<i>United States v. Chambliss</i> , 425 F. Supp. 1330 (E.D. Mich. 1977)	7,42
<i>United States v. Chatman</i> , 573 F.2d 565 (9th Cir. 1977)	27,30
<i>United States v. Coleman</i> , 450 F. Supp. 433 (E.D. Mich. 1978)	7
<i>United States v. Cortez</i> , 595 F.2d 505 (9th Cir. 1979)	41,43
<i>United States v. Craemer</i> , 555 F.2d 594 (6th Cir. 1977)	9,41,42,45
<i>United States v. Cupps</i> , 503 F.2d 277 (6th Cir. 1974)	46
<i>United States v. Davis</i> , 482 F.2d 893 (9th Cir. 1973)	44
<i>United States v. Dewberry</i> , 425 F. Supp. 1336 (E.D. Mich. 1976)	7
<i>United States v. Elmore</i> , 595 F.2d 1036 (5th Cir. 1979)	41,42
<i>United States v. Floyd</i> , 418 F. Supp. 724 (E.D. Mich. 1976)	7,33,42
<i>United States v. Gill</i> , 555 F.2d 597 (6th Cir. 1977)	45
<i>United States v. Guana-Sanchez</i> , 484 F.2d 590 (7th Cir. 1973)	25
<i>United States v. Hunter</i> , Cr. No. 5-81318 (E.D. Mich. filed 2/4/76) <i>aff'd</i> <i>in part, rev'd in part</i> 550 F.2d 1066 (6th Cir. 1977) ..	9, 45,56
<i>United States v. Jackson</i> , 533 F.2d 314 (6th Cir. 1976)	25
<i>United States v. Johnson</i> , 495 F.2d 378 (4th Cir. 1974)	25

<i>United States v. Klein</i> , 592 F.2d 909 (5th Cir. 1979)	41,43
<i>United States v. Lampkin</i> , 464 F.2d 1093 (3rd Cir. 1972)	25
<i>United States v. Lewis</i> , 556 F.2d 717 (6th Cir. 1977)	9,10,30,33,42,45,47
<i>United States ex rel. Walls v. Mancusi</i> , 406 F.2d 505 (2nd Cir. 1969)	25
<i>United States v. Martinez-Fuerte</i> , 428 U.S. 543 (1976)	49
<i>United States v. McCaleb</i> , 552 F.2d 717 (6th Cir. 1977)	<i>passim</i>
<i>United States v. McClain</i> , 452 F. Supp. 195 (E.D. Mich. 1977)	7
<i>United States v. McDevitt</i> , 508 F.2d 8 (10th Cir. 1974)	25
<i>United States v. Mendenhall</i> , 596 F.2d 706 (6th Cir. 1979)	18,28,29
<i>United States v. Miles</i> , 425 F. Supp. 1256 (E.D. Mich. 1977)	7
<i>United States v. Miller</i> , 589 F.2d 1117 (1st Cir. 1978)	25
<i>United States v. Oates</i> , 560 F.2d 45 (2nd Cir. 1977)	33,47
<i>United States v. Pope</i> , 561 F.2d 663 (6th Cir. 1977)	10,45
<i>United States v. Price</i> , 599 F.2d 494 (2nd Cir. 1979)	9,10,41
<i>United States v. Prince</i> , 548 F.2d 164 (6th Cir. 1977)	47
<i>United States v. Pruss</i> , Cr. No. 5-81244 (E.D. Mich. 1/14/76)	56
<i>United States v. Rico</i> , 594 F.2d 320 (2nd Cir. 1979)	41,42

<i>United States v. Rogers</i> , 436 F. Supp. 1 (E.D. Mich. 1976)	7,33
<i>United States v. Ruiz-Estrella</i> , 481 F.2d 723 (5th Cir. 1973)	44
<i>United States v. Scott</i> , 545 F.2d 38 (8th Cir. 1976)	35
<i>United States v. Smith</i> , 574 F.2d 882 (6th Cir. 1978)	8,42,45
<i>United States v. Van Lewis</i> , 409 F. Supp. 535 (E.D. Mich. 1976) <i>aff'd</i> 556 F.2d 717 (6th Cir. 1977)	7,41,47
<i>United States v. Vasquez-Santiago</i> , 602 F.2d 1069 (2nd Cir. 1979)	39,41
<i>United States v. Westerbann-Martinez</i> , 435 F. Supp. 690 (E.D. N.Y. 1977)	32,36,37,42
<i>United States v. Wylie</i> , 569 F.2d 62 (D.C. Cir. 1977)	28
<i>Warren v. Mississippi</i> , # 79-5114, ___ U.S. ___, 48 U.S.L.W. 3322 (U.S. Nov. 13, 1979)	20
<i>Wong Sun v. United States</i> , 371 U.S. 471 (1963)	10,54,57
<i>Ybarra v. Illinois</i> , ___ U.S. ___ 48 U.S.L.W. 4023 (U.S. Nov. 28, 1979)	13,20,27,45

Constitution and Statutes:

United States Constitution:

Fourth Amendment	<i>passim</i>
Fifth Amendment	54
18 U.S.C. 111 (1970)	22
18 U.S.C. 751(a) (1970)	22
21 U.S.C. 841(a)(1) (1970)	11
49 U.S.C. 1373(a) (1970)	34

Other Authorities:

4 W. Blackstone, Commentaries *289	24
CAB No. 142, Local and Passenger Rules Tariff No. PR-6, Rule 350, 69th Revised (effective 2/10/76 - 2/24/76)	34
Government's Petition for Rehearing with Suggestion for Rehearing En Banc, <i>United States v. Mendenhall</i> , 596 F.2d 706 (6th Cir. 1979)	27,28,51
3 W. LaFave, <i>Search and Seizure, A Treatise on the Fourth Amendment</i> (1978)	39
<i>Official Airline Guide, North American Edition</i> at 709, 711-12 (Effective 2/1/76 to 2/15/76)	3,32
Perkins, <i>The Law of Arrest</i> , 25 Iowa L. Rev. 201 (1940)	24
Supplemental Appendix for Appellant, <i>United States v. Mendenhall</i> , 596 F.2d 706 (6th Cir. 1979)	47
Supplemental Brief for the United States, <i>United States v. Mendenhall</i> , 596 F.2d 706 (6th Cir. 1979)	32

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 78-1821

UNITED STATES OF AMERICA,
Petitioner,
v.

SYLVIA L. MENDENHALL,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

OPINIONS BELOW

The opinion of the *en banc* court of appeals (Pet. App. 1a-7a) is reported at 596 F.2d 706. The opinion of the panel (Pet. App. 8a) and the opinion of the district court (Pet. App. 9a-20a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1979. On April 27, 1979, Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to June 5, 1979. The petition for a writ of certiorari was filed on that date and was granted on October 1, 1979. The jurisdiction of this Court is

invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether defendant was arrested within the meaning of the Fourth Amendment when she was seized without probable cause by federal agents in a room within a private, locked DEA office in an airport for the purpose of obtaining a search of her person.

2. Whether the detention and search of defendant was unjustified under the law of investigatory stops where federal agents knew only that defendant (a) was on a flight from Los Angeles to Detroit; (b) was the last passenger to get off the airplane; and, (c) upon deplaning, appeared nervous to the federal agents and looked around the area where the agents were standing.

3. Whether the consent to search given by the defendant was invalid where the consent was not voluntary and was the product of an illegal detention.

STATEMENT

1. At 6:25 a.m. on February 10, 1976 Sylvia Mendenhall was observed by two federal agents as she exited an American Airlines plane from Los Angeles at Detroit Metropolitan Airport. (A. 9-10) The agents had no information about Sylvia Mendenhall or any other passenger nor any tip that a delivery of narcotics was to occur. (A. 18)

According to DEA Agent Thomas Anderson, Sylvia Mendenhall was the last person to exit the aircraft and scanned the area where the agents were standing in a manner that "appeared to be very nervous." (A. 9, 14)

The agents followed Sylvia Mendenhall as she proceeded through the airport. She was overheard by

Agent Anderson asking directions to the Eastern Airlines ticket counter from a skycap.

Sylvia Mendenhall proceeded to the Eastern Airlines ticket counter, retrieved an airline ticket from her purse, and asked for an Eastern ticket to be used by her on a flight from Detroit to Pittsburgh. (A. 10) Anderson, standing in line behind her, observed that the ticket she presented was issued by American Airlines. The itinerary showed a flight from Los Angeles to Detroit to Pittsburgh. (A. 10) The ticket agent advised Sylvia Mendenhall that her ticket was good and that all she needed was an Eastern boarding pass. This was given to her. She proceeded down the concourse to board the Eastern flight. (A. 11)

Agent Anderson testified that he felt it was unusual for Sylvia Mendenhall to be changing from an American Airlines plane to an Eastern Airlines plane. (A. 17) However, neither Anderson nor his fellow agent made any effort to check the airlines flight schedules. (A. 17) In fact, there were no American flights to Pittsburgh as American Airlines did not fly between Detroit and Pittsburgh.¹

Agent Anderson testified that as Sylvia Mendenhall was "approximately halfway down the concourse,

¹ It appears that Agent Anderson, who had watched Sylvia Mendenhall exit an American Airlines flight from Los Angeles, assumed that she was booked on an American flight from Detroit to Pittsburgh merely because her itinerary was on an American ticket. (A. 10, 17) Given Anderson's ability to see and hear what occurred at the Eastern ticket counter, (A. 11) his own experience as an airline passenger, (A. 16) and his assignment for over a year at the Detroit Metropolitan Airport DEA office, (A. 7) it is difficult to understand why he would make such an assumption. In any event, Sylvia Mendenhall could not have been booked on an American flight from Detroit to Pittsburgh as there were no such flights. *Official Airline Guide, North American Edition* at 709 (effective 2/1/76 to 2/15/76).

Agent Myhills and myself approached her, identified ourselves as Federal agents, and I requested some form of identification from the girl." (A. 11) According to Anderson, "[s]he was not nervous" at this time. (A. 18) Complying with the instruction of the agent, Sylvia Mendenhall produced her driver's license. Anderson asked her if she still resided at the address shown. She said she did. (A. 18)

The agent next asked Sylvia Mendenhall to produce her airline ticket. The ticket was produced for him. In response to Anderson's question, she told the agent that she had used a different name on the ticket because she felt like using the name. (A. 11) In response to further questioning Sylvia Mendenhall informed the agents that she had been in California for two days. (A. 12)

According to Agent Anderson, "I then told her that I specifically — that I was a Federal narcotics agent. She became quite shaken, extremely nervous. She had a hard time speaking." (A. 11-12) Anderson retained the driver's license and airline ticket while he questioned Sylvia Mendenhall. When he returned them he requested that she accompany the agents to their office "for further questioning". (A. 12) There is no evidence that Sylvia Mendenhall gave any verbal assent to the "request" of the agents. She was not told that she could refuse to accompany them to the office. Had she attempted to leave she would have been stopped. (A. 19)

The DEA office is located a story up from the airport concourse. The office is locked and not open to the public. (A. 19) Sylvia Mendenhall, on her own, "could have gone to that general area, but she certainly wouldn't have gone to our office." (A. 19)

Sylvia Mendenhall accompanied the two male

agents to the DEA office. Once inside the office the agents first brought up the matter of a body search. According to Anderson, "I asked her for her consent to search her person as well as her handbag. I stated to her that she had the right to decline the search if she so desired. Her response was 'Go ahead.'" (A. 12) A search of Sylvia Mendenhall's purse resulted in the discovery of a ticket issued February 7 from Pittsburgh to Chicago to Los Angeles. Sylvia Mendenhall acknowledged that this was the ticket she had used on her trip to California. (A. 12)

Agent Anderson then placed a telephone call to the airport security police requesting that a female officer come to the DEA office to search the person of Sylvia Mendenhall. (A. 12)

Beverly Mercier, a female police officer with the Metro Airport Police Department, subsequently arrived at the DEA office. (A. 23-24) Officer Mercier had previously searched women for various reasons, including approximately ten times for narcotics. She always had the women undress themselves. She had never had a case where a woman refused to consent to the search. (A. 26)

After giving the agents her gun, Officer Mercier took Sylvia Mendenhall into a separate room within the DEA office. (A. 24) If Sylvia Mendenhall had tried to leave the room prior to being searched by the officer she would have been stopped by the agents. (A. 21)

Officer Mercier testified that she asked Sylvia Mendenhall if she consented to the search: "At that moment she told me yes, she did. I said okay. It's a strip search. That means everything goes off. After that, she said—well, she had a plane to catch and I told her—I said, if you don't have anything on you, you don't have a problem." (A. 24) Officer Mercier had never

informed Sylvia Mendenhall that she did not have to be searched. (A. 27)

Sylvia Mendenhall began to undress under the direction of Officer Mercier although "[s]he kept saying she had a flight to catch." (A. 27) She eventually took off her blouse, brassiere, skirt, pantyhose, slip, and panties at the direction of the officer. Two packages, secreted in her brassiere and panties, were taken by the officer. (A. 24-25)

A personal history statement later taken from Sylvia Mendenhall revealed that she was twenty-two years old and had an eleventh grade education. (A. 13) An FBI record check indicated that she had two previous arrests; one for shoplifting, another for possession of marijuana. (A. 14)

It is unclear as to how much time elapsed while these events occurred. Agent Anderson testified that only five to six minutes elapsed from the time of the stop of Sylvia Mendenhall until she "consented" to the search. He estimated that Officer Mercier and Sylvia Mendenhall were in the room for approximately five to ten minutes while the strip search was conducted. (A. 13) Officer Mercier, however, testified that she did not receive the phone call asking her to assist the DEA agents on a search of a female until approximately 6:45 a.m. (A. 24) This was some twenty minutes after Sylvia Mendenhall's plane had arrived. (A. 8)

2. The search of Sylvia Mendenhall was conducted at the direction of agents assigned to the Drug Enforcement Administration's detail at the Detroit Metropolitan Airport. The legality of some of the activities of the agents assigned to the airport detail was first considered by the United States District Court for the Eastern District of Michigan in a number of cases

beginning in 1975.²

The procedure used by the airport detail is as follows: Agents watch passengers as they disembark flights from cities which the agents characterize as either a major narcotics distribution center or a city through which drug couriers pass on their way to a major narcotics distribution center. One or more passengers, usually described as "nervous" by the agents, are followed as they proceed through the airport. When it appears that passengers are about to leave the airport, they are stopped by the agents. Following a show of authority by the agents, identification, as well as the airline ticket, is required to be produced. Various questions are put to the passengers, including where they came from, how long they were there, and the purpose of their trip. The passenger is then removed to a private room, such as a baggage claim room, or to the DEA's private office at the airport. Inside the private room or office, the agents demand, and conduct, a search of the person and luggage of the passenger.

The stops and searches occur regardless of the amount or quality of the information known to the agents. At times, the knowledge possessed by the agents at the time of the stop and subsequent search has clearly provided probable cause for arrest. At other

² The reported opinions include *United States v. Bryant*, 406 F. Supp. 635 (E.D. Mich. 1975); *United States v. Van Lewis*, 409 F. Supp. 535 (E.D. Mich. 1976); *United States v. Floyd*, 418 F. Supp. 724 (E.D. Mich. 1976); *United States v. Allen*, 421 F. Supp. 1372 (E.D. Mich. 1976); *United States v. Miles*, 425 F. Supp. 1256 (E.D. Mich. 1977); *United States v. Chambliss*, 425 F. Supp. 1330 (E.D. Mich. 1977); *United States v. Dewberry*, 425 F. Supp. 1336 (E.D. Mich. 1977); *United States v. Rogers*, 436 F. Supp. 1 (E.D. Mich. 1976); *United States v. Coleman*, 450 F. Supp. 433 (E.D. Mich. 1978); *United States v. McClain*, 452 F. Supp. 195 (E.D. Mich. 1977).

times, however, agents have made arrests and searches based on the most innocuous of information. In these instances, when narcotics have been discovered, the government has sought to justify the search on the basis of an unwritten "drug courier profile."³

3. The United States Court of Appeals for the Sixth Circuit has reviewed dozens of cases involving the search of airline passengers. While the Sixth Circuit has refused to uphold searches merely on the government's claim that a defendant satisfied the "drug courier profile," the court has, in a series of opinions, provided guidelines to the lower courts as well as the agents.

In *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977), the court refused to uphold a stop where several profile characteristics were allegedly satisfied. The opinion noted, however, that "a set of facts may arise in which the existence of certain profile characteristics constitutes reasonable suspicion." *Id.* at 720. The court upheld a stop in *United States v. Smith*, 574 F.2d 882 (6th Cir. 1978) where the only information the agents had beyond the satisfaction of some of the "profile characteristics" was that the defendant exhibited an abnormal abdominal bulge. Likewise, in *United States v. Canales*, 572 F.2d 1182 (6th Cir. 1978), the court upheld a stop as being based on reasonable suspicion even though defendant's "traveling was potentially innocent and capable of explanation." *Id.* at 1187.

The Sixth Circuit has not required probable cause to support a stop at the airport. Rather, the lower standard of reasonable suspicion has been employed.

³ Some of the characteristics of the "drug courier profile," as testified to by agents assigned to the Detroit Metropolitan Airport detail, are listed *infra* at p. 42, nn. 23, 24.

Thus, a stop at the airport was upheld in *United States v. Andrews*, 600 F.2d 563 (6th Cir. 1979), although the informer's tip relied upon was insufficient under both prongs of the probable cause test advanced by this Court.

The Sixth Circuit has held that reasonable suspicion does not, however, support a search for narcotics. *United States v. Craemer*, 555 F.2d 594 (6th Cir. 1977). Taking a passenger out of the public area and detaining him in a private airport office for the purpose of search goes beyond a *Terry* stop and is an arrest requiring probable cause. *United States v. Hunter*, 550 F.2d 1070 (6th Cir. 1977); *United States v. McCaleb*, *supra*. The court has also held that a passenger who went to the DEA office at his own request was not under arrest and probable cause was not required. *United States v. Canales*, *supra*.

In determining whether probable cause exists to support an arrest and search at the airport, the Sixth Circuit has held that "using the profile to determine probable cause would engage this Court in an improper analysis." *United States v. Lewis*, 556 F.2d at 389. The Sixth Circuit has adopted the analytical approach set down by then Circuit Judge Burger in *Smith v. United States*, 385 F.2d 833 (D.C. Cir. 1966):

[P]robable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observe as trained officers. We weigh not individual layers but the "laminated" total.

Id. at 837. *United States v. Lewis*, *supra*, at 389; *United States v. Prince*, 548 F.2d 164, 166 (6th Cir. 1977).

Although the Sixth Circuit has held that meeting the "profile" does not establish probable cause, "facts

known to the agents which correspond to characteristics in the profile may be considered along with information obtained from other sources in determining that the agents did have probable cause to believe that an offense is being or has been committed." *United States v. Pope*, 561 F.2d 663, 667 (6th Cir. 1977). The court has upheld searches where information that satisfied some characteristics of the "drug courier profile" together with an agent's investigation provided probable cause. *United States v. Lewis, supra*; *United States v. Prince, supra*.

The Sixth Circuit has refused to uphold searches at the airport where probable cause did not exist and where a consent was obtained through the exploitation of illegal actions and was not freely and voluntarily given. In *United States v. McCaleb, supra*, the court cited *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) and *Wong Sun v. United States*, 371 U.S. 471 (1963) in holding that a "consent" could not uphold a search where it followed an unconstitutional stop and arrest and was obtained while the defendants were detained by agents in unfamiliar surroundings. The court, however, has upheld a search, as based on voluntary consent, where the defendant, maintaining his innocence, invited a search to demonstrate to the agents that he was not carrying narcotics. *United States v. Canales, supra*.

4. The evidentiary hearing in this case was held on October 18, 1976. (A. 3) Sylvia Mendenhall failed to appear for this hearing. Over objections by her counsel, the court proceeded in her absence.

Following the defendant's arrest, defense counsel moved for rehearing so that defendant could present evidence relevant to her arrest and alleged consent to search. This was denied.

The defendant was charged, by indictment, with bond-jumping as a result of her failure to appear at the evidentiary hearing in the instant case. (E.D. Mich. Cr. No. 7-81109). Following a bench trial she was acquitted of this charge.

In her direct appeal to the Sixth Circuit in the instant case Sylvia Mendenhall alleged that the district court erred in its refusal to re-open the evidentiary hearing since it has never been established that Sylvia Mendenhall voluntarily absented herself from the hearing. Both the panel and the en banc decisions of the Sixth Circuit found the search invalid on the present record, however, and did not reach this question.

5. The district court, by a "Memorandum and Order" dated November 18, 1976, denied defendant's "Motion to Suppress Evidence." (Pet. App. 9a)

Following a non-jury trial on stipulated facts, Sylvia Mendenhall was convicted of possession of heroin with intent to distribute it in violation of 21 U.S.C. §841(a) (1). She was sentenced to a term of 18 months imprisonment to be followed by a three-year special parole term.

6. A panel of the Court of Appeals reversed. An "Order" entered on October 20, 1978 stated that "the court concludes that this case is indistinguishable from *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977)." (Pet. App. 8a)

The case was reheard by the court en banc, along with *United States v. Camacho*, No. 78-5081. In reinstating the panel decision, the court stated:

Our review of the facts in both of these cases convinces the majority of this court that in neither case was there valid consent to search within the meaning of *United States v. McCaleb*, 552 F.2d

717 (6th Cir. 1977). We also hold that the so-called drug courier profile does not, in itself, represent a legal standard of probable cause in this Circuit. We recognize, of course, that the drug enforcement agency's employment of this profile in educating its officers as to what conduct to look for in relation to drug couriers is a perfectly valid law enforcement device.

(Pet. App. 2a)

SUMMARY OF ARGUMENT

I

A. A reasonable person in the position of Sylvia Mendenhall could only believe she was under arrest. Sylvia Mendenhall was stopped on the way to board her flight to Pittsburgh by federal agents who required that she produce identification. They retained the identification while asking additional questions and requiring that she produce her airplane ticket. She was escorted out of the public area of the airport to the private locked office of the Drug Enforcement Administration, where the subject of a body search was first raised.

From the outset the objective of the agents was to search for narcotics. There is no suggestion that Sylvia Mendenhall was told that she did not have to answer the questions of the agents, or that she would be released to catch her flight.

There is nothing in this record to suggest that any consent to the DEA office detention, verbal or otherwise, was ever requested by the agents or given by Sylvia Mendenhall. Sylvia Mendenhall was not told, nor did she have any reason to assume, that she had any choice but to accompany the agents. She was not free to

leave. Had she attempted to walk away she would have been stopped.

B. The DEA office detention in this case constituted an arrest. The facts of this case clearly meet the constitutionally mandated criteria for determining point of arrest:

(1) The freedom of movement of Sylvia Mendenhall was absolutely restrained. *See Henry v. United States*, 361 U.S. 98 (1959); *Dunaway v. New York*, ___ U.S. ___, 99 S.Ct. 2248 (1979).

(2) The purpose of the detention was to look for narcotics. *See Sibron v. New York*, 392 U.S. 40 (1968); *Terry v. Ohio*, 392 U.S. 1 (1968); *Ybarra v. Illinois*, ___ U.S. ___, 48 U.S.L.W. 4023 (U.S. Nov. 28, 1979).

(3) The length of detention must be characterized as a threatened indefinite detention. *See U.S. v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Terry v. Ohio*, *supra*.

II

A. *Terry v. Ohio*, *supra*, and its progeny have required something more substantial than inarticulate hunches or even good faith on the part of a police officer before a citizen may be subjected to an investigative stop.

The facts known to the federal agents at the time they stopped, and seized, Sylvia Mendenhall were that she had arrived in Detroit on an American Airlines flight from Los Angeles, was the last passenger to get off the airplane, and had glanced around the deplaning area in what the agents characterized as a nervous manner.

Two other pieces of information were stated by the agents as drawing their attention to Sylvia Mendenhall, but this information evaporated prior to the moment of the stop. The fact that Sylvia Mendenhall

picked up no luggage had no probative value when the agent discovered that Sylvia Mendenhall was not stopping in Detroit, but was ticketed through to Pittsburgh. The fact that Sylvia Mendenhall was flying on to Pittsburgh on Eastern Airlines rather than American had no value because the agent testified that he was not aware of the airline schedules involved and thus could attach no significance to the route Sylvia Mendenhall was taking.

Had the agents been familiar with airline scheduling or taken a moment to check it, they would have discouraged that, as most travellers know, when a person is ticketed to destination on two different airlines, the baggage is automatically transferred. The agents also would have discovered that American Airlines did not schedule any flights from Detroit to Pittsburgh.

Rather than continuing their surveillance, the agents stopped Sylvia Mendenhall with the clear intention of obtaining a search of her person for narcotics prior to restoring her freedom.

B. It is clear that the *Terry* seizure was complete and Sylvia Mendenhall's liberty was restrained when the agents requested and retained her driver's license, continued to question her, and then required her to give them her airplane ticket. Sylvia Mendenhall's freedom to walk away was restrained and she was seized within the meaning of *Terry, supra*; *United States v. Brignoni Ponce*, 422 U.S. 873 (1975); and, *Brown v. Texas*, ___ U.S. ___, 99 S.Ct. 2637 (1979).

C. Reliance upon an "airport drug courier profile" cannot provide the missing reasonable suspicion in this case. This unwritten profile seems to contain every characteristic one could use to describe a human being. It is clear that almost all travellers would fit a large

number of the profile characteristics that have been named thus far.

All the courts of appeals that have analyzed this airport courier profile agree that it is an insufficient basis upon which to justify an investigatory stop. A profile cannot eliminate the case-by-case approach to determine whether there is reasonable suspicion to stop a citizen. The courts of appeals have refused to allow use of the "profile" to elevate facts, such as those observed in this case, in order to justify an investigatory stop.

D. The degree of restraint imposed on Sylvia Mendenhall exceeded that permissible in an investigatory detention. *United States v. Brignoni-Ponce*, *supra*, represents the greatest interference with privacy and freedom of movement that this Court has allowed in seizures that are not supported by probable cause. In *Brignoni-Ponce* the detention was a visual inspection that normally lasted less than a minute. The treatment of Sylvia Mendenhall by the agents constituted an illegal seizure of her person even if a less intrusive investigation would have been permissible.

E. The kind of power sought by the government in this case would necessarily entail substantial intrusions upon the fourth amendment protection of large numbers of citizens and would seriously impair the right to travel and to privacy itself.

III.

A. The "consent" of Sylvia Mendenhall was not freely and voluntarily given. She was stopped by two men who identified themselves as federal agents, was questioned by them, and was required to produce identification and her airline ticket. She was ushered

into the private, locked office of the DEA where an agent requested consent to search "her person as well as her handbag."

Immediately prior to being taken to the DEA office and granting "consent" Sylvia Mendenhall was described by the agent as being quite shaken, extremely nervous and having a hard time speaking. She could only believe that she would be held indefinitely, or forcibly searched by male agents, unless consent to search was given.

It was not until the female police officer arrived that Sylvia Mendenhall was first informed that the search of "her person as well as her handbag" was to be a full strip search. She began protesting that she had a plane to catch. Whatever the validity of her earlier "consent" it was revoked at this point. The search, however, commenced despite Sylvia Mendenhall's continued protests that she had a plane to catch.

The government has failed to meet its burden of proving that the "consent" was truly free and voluntary and not the result of duress or coercion, express or implied. *Bumper v. North Carolina*, 391 U.S. 543 (1968); *Schneckloth v. Bustamonte*, 412 U.S. 212 (1973). Given the serious physical restraints, the psychological pressure, and her own subjective state, the consent of Sylvia Mendenhall was not the product of a free will.

B. Apart from the involuntary nature of the "consent" under the totality of the circumstances, the "consent" was invalid because it was obtained through the exploitation of illegal police conduct. Sylvia Mendenhall was stopped without reasonable suspicion and arrested without probable cause. The "consent" was given while the illegal detention continued.

The only intervening circumstance claimed is that

Sylvia Mendenhall, while locked in the private DEA office, was told that she could refuse consent. The decisions of this Court in *Brown v. Illinois*, 422 U.S. 590 (1975) and *Dunaway v. New York*, — U.S. —, 99 S.Ct. 2248 (1979) are dispositive of the claim that this fact, standing alone, is sufficient to dissipate the taint of the illegality that preceded it.

The agents illegally seized Sylvia Mendenhall in the hope that something might turn up. The "consent" was obtained within minutes of the illegal stop and arrest. There was no intervening factor of significance. The "consent," obtained through the exploitation of illegal actions, cannot support the search.

C. The court of appeals correctly applied the established law of this Court in refusing to uphold the search of Sylvia Mendenhall.

ARGUMENT

I.

**DEFENDANT WAS ARRESTED WITH-
IN THE MEANING OF THE FOURTH
AMENDMENT WHEN SHE WAS SEIZED
WITHOUT PROBABLE CAUSE BY
FEDERAL AGENTS IN A ROOM WITH-
IN A PRIVATE LOCKED DEA OFFICE
IN AN AIRPORT FOR THE PURPOSE
OF OBTAINING A SEARCH OF HER
PERSON.**

**A. The Detention of Defendant Required
Probable Cause Before Her Interests of
Privacy and Personal Security Gave Way.**

When Sylvia Mendenhall was taken by two federal agents from the public airport concourse to a locked private DEA interrogation office for the purpose of

obtaining a search of her person an arrest had occurred. The normal level of probable cause was necessary before the interests of privacy and personal security would give way. The law concerning the point of arrest was recently reaffirmed in *Dunaway v. New York*, ___ U.S. ___, 99 S.Ct. 2248 (1979).

The clarity of the arrest issue is dispositive of the entire matter for the government does not claim probable cause to arrest. There is no airport DEA office exception to the fourth amendment.

The arrest, both in design and execution, was an investigatory seizure to search Sylvia Mendenhall and her belongings for contraband. The question of a search of Sylvia Mendenhall was not brought up in the public concourse. Rather, the matter was broached when she had been secured in the locked DEA office. There was nothing in the transaction that would cause Sylvia Mendenhall to believe that she would be free to depart and catch her flight to Pittsburgh.⁴

The defendant here, like the defendants in *Brown v. Illinois*, 422 U.S. 590 (1975) and *Dunaway v. New York*, *supra*, was admittedly seized without probable cause in the hope that something might turn up; she assented without any intervening event of significance.

1. A reasonable person in the position of defendant could only believe that she was under arrest.

Sylvia Mendenhall was stopped by persons, unfamiliar to her, who identified themselves as agents of the

⁴ If a citizen in the DEA office chooses not to consent to the search, then this person will be required to wait in the locked office until an "attempt" [is made] to obtain a federal search warrant." Government's Petition for Rehearing with Suggestion for Rehearing En Banc at 8. *United States v. Mendenhall*, 596 F.2d 706 (6th Cir. 1979).

United States. (A. 11) The agents demanded identification from her. They retained that identification while asking a series of additional questions and requiring her to produce her airplane ticket. (A. 11-12, 18-19) There is no suggestion that she was informed by the agents of any option not to answer their questions.

She was soon afterwards escorted out of the public area of the airport. (A. 19) The agents never inquired as to when her scheduled flight would be leaving. Sylvia Mendenhall was never informed that she did not have to accompany the agents or that she could leave if she so chose.

Sylvia Mendenhall was taken inside the private, locked office of the Drug Enforcement Administration. (A. 19) The office was unfamiliar to her. At this time there is still no suggestion by the agents that she is free to leave. Presumably, the agents, not Sylvia Mendenhall, hold the keys. The questioning continues.

2. The detention in this case went beyond established law defining the parameters of a *Terry* stop.

The intrusion here bears no resemblance to the investigatory stops that have been considered by this Court. In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the visual inspections involved no search of the vehicle or its occupants and "usually consume[d] no more than a minute." In contrast, the detention of Sylvia Mendenhall was not to maintain the status quo as envisioned in *Adams v. Williams*, 407 U.S. 143 (1972), but to search for narcotics. Under *Terry v. Ohio*, 392 U.S. 1 (1968) such a purpose is constitutionally impermissible:

The *Terry* case created an exception to the requirement of probable cause, an exception

whose "narrow scope" this Court "has been careful to maintain." Under that doctrine a law enforcement officer, for his own protection and safety may conduct a pat down to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted. See, e.g., *Adams v. Williams*, *supra* (at night, in high-crime district, lone police officer approached person believed by officer to possess gun and narcotics). Nothing in *Terry* can be understood to allow a generalized "cursory search for weapons" or, indeed, any search whatever for anything but weapons.

Ybarra v. Illinois, ___ U.S. ___, 48 U.S.L.W. 4023, 4025 (U.S. November 28, 1979). See also *Warren v. Mississippi*, ___ U.S. ___, 48 U.S.L.W. 3322 (U.S. November 13, 1979) (Mr. Justice White dissenting from the denial of the petition for writ of certiorari.)

There is nothing in this record that justifies the detention of Sylvia Mendenhall in the locked DEA office. There is nothing in this record which indicates that there was any question of safety or protection of the officers. *Terry v. Ohio*, *supra*; *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). Sylvia Mendenhall had just gotten off the airplane and presumably had passed through a metal detector in Los Angeles and hence, she carried no weapons. The intrusion here cannot be rationally compared to the de minimis intrusion in *Mimms* where the only question was whether a driver shall spend the period of a brief detention sitting in the driver's seat of his car or standing alongside it.

There is nothing in this record which indicates that the area where Sylvia Mendenhall was first stopped was noisy or crowded. Indeed, it is unlikely that the concourse was noisy or crowded at 6:25 in the morning. Further, it is clear that the intent of the agents was to

isolate Sylvia Mendenhall and it is unlikely that they would have chosen a busy spot for the stop.

Similarly, there is nothing in this record indicating compelling circumstances for the agents to avoid attention to themselves. Further, in determining whether an arrest has occurred, it is the treatment of the citizen under the probable cause standard which is relevant:

A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront. Indeed, our recognition of these dangers, and our consequent reluctance to depart from the proven protections afforded by the general rule, is reflected in the narrow limitations emphasized in the cases employing the balancing test. For all but those narrowly defined intrusions, the requisite "balancing" has been performed in centuries of precedent and is embodied in the principle that seizures are "reasonable" only if supported by probable cause.

Dunaway v. New York, 99 S.Ct. at 2257 (footnote omitted).

Finally, there is nothing in this record which indicates that Sylvia Mendenhall was concerned by public embarrassment and was anxious to choose incommunicado detention instead.⁵

3. The defendant did not consent to the detention.

The record in this case is completely barren of any facts that would support a finding that Sylvia

⁵ Different circumstances illustrating a citizen anxious to avoid embarrassment are found in *United States v. Canales*, 572 F.2d 1182 (6th Cir. 1978).

Mendenhall freely and voluntarily consented to the detention in the DEA office.

At the conclusion of the agents' interrogation of Sylvia Mendenhall in the public concourse she was quite shaken, extremely nervous, and having a hard time speaking. Yet, the government alleges that at this point she freely and voluntarily consented to the detention that followed. Agent Anderson testified:

I then told her that I specifically—that I was a Federal narcotics agent. She became quite shaken, extremely nervous. She had a hard time speaking. I handed her her ticket back and her driver's license back. She had a very difficult time getting these back into her purse, and at that time I asked her if she would accompany myself and Agent Myhills to our office, which was very nearby, very close, for further questioning.

(A. 12)

This is the only testimony in this record describing the initiation of the trip to the DEA office. There is nothing in the record to suggest that any consent to the detention, verbal or otherwise, was ever requested by the agents or given by Sylvia Mendenhall.

Sylvia Mendenhall was not told, nor did she have any reason to assume, that she had any choice but to accompany the agents. She was not free to leave. Had she attempted to walk away she would have been stopped. (A. 19)⁶

The government has failed to meet its burden of proving that Sylvia Mendenhall freely and voluntarily

⁶ Had Sylvia Mendenhall attempted to leave the agents, she arguably would have violated 18 U.S.C. 751 (a) (attempting to escape from the custody of an officer of the United States) or 18 U.S.C. 111 (forcibly resisting, opposing, or impeding an officer of the United States).

consented to the detention.⁷ Additionally, the stop of Sylvia Mendenhall, preceding her alleged consent to detention, was not based on reasonable suspicion. The government has likewise failed to meet its burden of proving that the alleged consent to detention was not the product of the illegality of the stop.⁸ In the complete absence of any facts in the record suggesting a valid consent, the detention of Sylvia Mendenhall was an arrest.

B. The Point of Arrest Requiring Probable Cause Occurs When the Detention Deprives a Citizen of Liberty Within the Meaning of the Fourth Amendment.

This Court in *Dunaway v. New York*, *supra*, has squarely held that the type of detention described in this record constitutes an arrest:

[T]he detention of petitioner was in important respects indistinguishable from a traditional arrest. Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was "free to go;" indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody.

Id. at 2256.

The detention of Sylvia Mendenhall is indistinguishable from the detention described above.

The deprivation of liberty standard articulated in *Dunaway* is well settled and is rooted in both Supreme

⁷ See, *infra* p. 50, where the question of defendant's alleged consent to the search of her person is discussed.

⁸ See, *infra* p. 54, where the effect of the illegal stop and arrest on the alleged consent to the search of her person is discussed.

Court and common law decisions. In *Henry v. United States*, 361 U.S. 98 (1959), the Court reversed the conviction of the defendant because the arresting officers did not have probable cause at the time the defendant was arrested. *Id.* at 103-04. In reaching this conclusion, the Court first had to determine the point at which the defendant was arrested.

The prosecution conceded below, and adheres to the concession here, that the arrest took place when the federal agents stopped the car. That is our view on the facts of this particular case. When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete.

Id. at 103 (footnote omitted). See also *Peters v. New York*, 392 U.S. 40, 67 (1968).

The common law provides further support for the deprivation of liberty test and, indeed, forms the historical basis for this standard. Blackstone provides the classical definition of arrest.

[T]he apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime.

4 W. Blackstone, Commentaries *289. See also *Genner v. Sparks*, 91 Eng. Rep. 74 (C.P. 1704).

Similarly, Perkins, in his definitive arrest article, states,

Mere words will not constitute an arrest, while, on the other hand, no actual, physical touching is essential. The apparent inconsistency in the two parts of this statement is explained by the fact that an assertion of authority and purpose to arrest followed by submission of the arrestee constitutes an arrest.

Perkins, *The Law of Arrest*, 25 Iowa L. Rev. 201, 260 (1940) (Footnotes omitted).

The detention at the DEA office at Detroit Metropolitan Airport constituted a deprivation of liberty under authority of law, and, therefore, an arrest for purposes of the fourth amendment.

1. **The constitutionally mandated criteria for determining the point of arrest are the detained person's freedom of movement, the purpose of the detention and the length of detention.**

Although *Terry v. Ohio*, 392 U.S. 1 (1968) permits a brief stop in certain circumstances, the factors which distinguish a *Terry* stop from an arrest compel the conclusion that the instant detention must be characterized as an arrest.

A review of the case law identifies three criteria to be used in determining the point of arrest:⁹

⁹ Post-*Terry* decisions in the courts of appeals have applied these criteria: *Coates v. United States*, 413 F.2d 371, 373-74 (D.C. Cir. 1969); *United States v. Miller*, 589 F.2d 1117, 1127 (1st Cir. 1978); *United States ex rel. Walls v. Mancusi*, 406 F.2d 505, 508-509 (2nd Cir. 1969); *United States v. Lampkin*, 464 F.2d 1093, 1095 (3rd Cir. 1972); *United States v. Johnson*, 495 F.2d 378, 381 (4th Cir. 1975); *United States v. Brunson*, 549 F.2d 348, 357 (5th Cir. 1977); *United States v. Jackson*, 533 F.2d 314, 315-16 (6th Cir. 1976); *United States v. Guana-Sanchez*, 484 F.2d 590, 591 (7th Cir. 1973); *United States v. Chaffin*, 587 F.2d 920, 923 (8th Cir. 1978); *United States v. Beck*, 598 F.2d 497, 500-01 (9th Cir. 1979); *United States v. McDevitt*, 508 F.2d 8, 11-12 (10th Cir. 1974).

The Michigan Supreme Court has adopted a similar definition of arrest. In *People v. Gonzales*, 356 Mich. 247, 97 N.W.2d 16 (1959), the court stated:

"An arrest is the taking, seizing, or detaining of the person of another, either by touching or putting hands on him, or by any act which indicates an intention to take him into custody and subjects the person arrested to the actual control and will of the person making the arrest. The act relied upon as constituting an arrest must have been performed with the intent to effect an arrest and must have been so understood by the party arrested." 4 Am.Jur., Arrest, 2.

Id. at 253, 97 N.W.2d at 19. See also *People v. Ulrich*, 83 Mich. App. 19, 268 N.W.2d 269 (1978).

- (1) The detained person's freedom of movement. *Henry v. United States, supra; Dunaway v. New York, supra.*
- (2) The purpose of the detention. *Sibron v. New York*, 392 U.S. 40 (1968);
- (3) The length of the detention. *United States v. Brignoni-Ponce, supra.*

Freedom of Movement. In *Dunaway v. New York, supra*, this Court specified freedom of movement as a controlling factor in determining the point of arrest. This decision reaffirmed the rule that a complete restriction of the freedom of movement would constitute an arrest for purposes of the fourth amendment.

Here, the freedom of movement by Sylvia Mendenhall must be found to have been absolutely restricted. She was stopped by federal agents who identified themselves as such. (A. 11) After questioning, she was taken up to the DEA office on the mezzanine level of the airport. This office is not open to the public and is locked. (A. 19)

Throughout this detention, Sylvia Mendenhall was not told that she was free to leave. The agent testified that the defendant would not have been free to leave at the initial stop, (A. 19) at the time of the request to go to the DEA office, (A. 19) or at the time of the full strip search, (A. 21) and that she would have been stopped had she attempted to do so.

Purpose of the Detention. In *Terry v. Ohio, supra*, and its progeny, the Court stated that either the determination of the detained person's identity or the maintenance of the "status quo" momentarily while waiting for extrinsic information to arrive were both permissible purposes justifying a brief *Terry* stop. Several courts have concluded that stops for purposes beyond those delineated purposes could not be justified under *Terry*, but were, in fact, arrests.

In *Sibron v. New York*, 392 U.S. 40 (1968), the Court held that "looking for narcotics" was not a permissible reason for justifying a *Terry* stop and subsequent search. *Id.* at 65; see also, *Ybarra v. Illinois*, 48 U.S.L.W. at 4025. In *United States v. Chatman*, 573 F.2d 565 (9th Cir. 1977), the Court of Appeals for the Ninth Circuit held that when the purpose of the stop went beyond *Terry* and became one of searching for narcotics, an arrest, necessitating probable cause, had occurred. *Id.* at 567.

These decisions compel the conclusion that the detention of the defendant in the DEA office, at the time permission to search was requested, constituted an arrest. The record demonstrates that neither routine identification questioning nor maintenance of the status quo was the reason for the detention of the defendant at the time of the "consent to search" request. Rather, the only purpose in bringing the defendant to the DEA office was for the purpose of carrying out a search for narcotics. Indeed, the government concedes that upon arriving at the DEA office, the detained person, pursuant to DEA procedures, is asked for consent to be searched. Government's Petition for Rehearing with Suggestion for Rehearing En Banc, at 7, *United States v. Mendenhall*, 596 F.2d 706 (6th Cir. 1979).

This stated DEA objective in detaining persons goes far beyond the legitimate scope of a *Terry* stop. *Sibron v. New York*, 392 U.S. at 65. Once the purpose of the detention is to look for narcotics, the detention must be justified by probable cause, since the detention no longer is a *Terry* stop, but constitutes an arrest.

Length of Detention. The Supreme Court, in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), states that the stop contemplated by *Terry* must be "brief."

Id. at 881. Underscoring the importance of this requirement, the Court adds that "any further detention or search must be based on consent or probable cause."

Id. at 878. In contrast, the stops effected by the DEA pursuant to its program, involve the threat of indefinite detention and must therefore be classified as arrests and not *Terry* stops.

The DEA procedure, once at the office stage, does not contemplate the brief stop permitted under *Terry*. As the government has noted, if a person stopped by the DEA chooses not to consent to the search, the person will be required to wait in the locked office until an "attempt [is made] to obtain a federal search warrant." Government's Petition for Rehearing with Suggestion for Rehearing En Banc, at 8, *United States v. Mendenhall, supra*. This threat of "indefinite detention," for purposes of narcotics investigation and without any opportunity for the detained person to leave, goes far beyond a brief *Terry* stop and must be found to constitute an arrest. See *United States v. Wylie*, 569 F.2d 62, 71 n.11 (D.C. Cir. 1977).

The detention of Sylvia Mendenhall must be characterized as a threatened indefinite detention. The circumstances establish that she was to be detained until the agents had either found what they were looking for or determined through a search that she carried no drugs.¹⁰ No time frame was ever specified to her. Although the record is unclear regarding how much time elapsed from the stop until the search actually

¹⁰ In *United States v. Camacho*, 596 F.2d 706 (6th Cir. 1979) the companion case to this case for the en banc hearing, Camacho had at least been given an upper time limit by the agents. The agent told Camacho that it would take "an hour or three or four hours" to attempt to obtain a search warrant after Camacho had asked him what would happen if he refused to consent to a search. (C.A. App. 88).

took place, it is clear that it was much longer than the "modest" intrusion envisioned in *United States v. Brignoni-Ponce*, *supra*, which "usually consume[d] no more than a minute."¹¹ 422 U.S. at 880. The threatened indefinite detention here was an invasion of personal security which indicates that an arrest occurred.

2. The Courts of Appeals have employed the constitutional arrest criteria in deciding the point of arrest in airport search cases.

The foregoing criteria together with the circumstances of this case describe an arrest for which probable cause is required before a citizen's interest of privacy and personal security must give way. The panel decision and the en banc Court of Appeals in this case found that such an arrest had occurred and that the facts of this case were very similar to and controlled by the Court of Appeals holding in *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977). *United States v. Mendenhall*, 596 F.2d 706 (6th Cir. 1979).

United States v. McCaleb, *supra*, does not hold or imply that a *Terry* stop is converted into an arrest whenever a person is moved from the location at which he is stopped. Nowhere does *McCaleb* hold that the act of movement requires probable cause.

McCaleb simply holds that under the circumstances of that case "when appellants were taken to the private office and were not free to leave, the arrest was clearly complete." 552 F.2d at 720. In this case when Sylvia Mendenhall was secured behind a locked door for the purpose of an investigatory search detention, the arrest was complete.

¹¹ In *Dunaway v. New York*, *supra*, defendant was taken from a neighbor's house. 99 S.Ct. at 2251. Presumably someone knew he had been taken into police custody. Sylvia Mendenhall's indefinite detention was incommunicado.

Other circumstances require different legal conclusions. When probable cause to arrest is present a detention to search is justified. *United States v. Lewis*, 556 F.2d 385 (6th Cir. 1977). Facts creating a reasonably inferred tie-in with trading in narcotics justify an investigatory stop, *United States v. Andrews*, 600 F.2d 563 (6th Cir. 1979), which can result in a voluntary trip to the DEA office. *United States v. Canales*, 572 F.2d 1182 (6th Cir. 1978). In *Canales* the record reflected that the defendant indicated discomfort at continuing the interrogation in front of his wife and stepson and, in a show of bravado, insisted on going to the DEA office.

Similarly, in *United States v. Chatman*, *supra*, the Court of Appeals for the Ninth Circuit found that the search of defendant's person in the agents' office required probable cause.

Sylvia Mendenhall's freedom of movement was absolutely restrained in a detention of indefinite duration for the purpose of a body search for narcotics. What the government fails, or refuses to perceive is that a reasonable person in the position of Sylvia Mendenhall could only believe that he or she was not free to leave. The agent's testimony confirms the objective facts and circumstances that would leave any reasonable person in Sylvia Mendenhall's position to believe that he or she was not free to leave. The record here compels a legal as well as a common sense conclusion that an arrest has occurred.

II.

THE DETENTION AND SEARCH OF DEFENDANT CANNOT BE JUSTIFIED UNDER THE LAW OF INVESTIGATORY STOPS WHERE FEDERAL AGENTS KNEW ONLY THAT DEFENDANT (1) WAS ON A FLIGHT FROM LOS ANGELES TO DETROIT, (2) WAS THE LAST PASSENGER TO GET OFF THE AIRPLANE, AND (3) UPON DEPLANING APPEARED NERVOUS TO THE FEDERAL AGENT AND LOOKED AROUND THE AREA WHERE AGENTS WERE STANDING.

A. There Was No Reasonable Suspicion Within the Meaning of the Fourth Amendment to Permit an Investigatory Stop of Defendant.

The following factors were articulated to justify the stop, arrest and search of Sylvia Mendenhall: (1) She was on an American Airlines flight from Los Angeles to Detroit; (2) she was the last passenger to get off the airplane; (3) upon deplaning, she appeared nervous to DEA Agent Anderson and looked around the area where the agents were standing; (4) she was changing from American Airlines to Eastern Airlines to continue to Pittsburgh; and (5) she picked up no luggage.

Factors four and five completely evaporated prior to the investigative stop in this case. Of course, only valid facts known to the officer at the moment of seizure are relevant:

[I]n making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?

Terry v. Ohio, 392 U.S. at 21-22 (citations omitted).

Transfer of Airlines. Although the government has argued that agents are aware of airline routing,¹² here the agent testified that he did not know the flight schedule relevant to this case. (A. 17) Therefore the agent was not in a position to know whether the fact that Sylvia Mendenhall was continuing to Pittsburgh via Eastern Airlines was unusual or not. There were no facts known to him that would support a conclusion that Sylvia Mendenhall was changing to an Eastern flight after having previously been booked on an American flight to Pittsburgh. The agent had observed her at the Eastern ticket counter where she was told that she needed only a boarding pass. (A. 11) From this information alone the agent should have known that Sylvia Mendenhall was confirmed on the Eastern flight to Pittsburgh prior to her arrival in Detroit.

Had the agent been familiar with the airline routing, or taken a moment to check it, he would have learned that there were no American flights from Detroit to Pittsburgh. He also would have learned that Eastern flight 341 from Detroit to Pittsburgh was a regularly scheduled connecting flight with American flight 218 from Los Angeles to Detroit. *Official Airline Guide, North American Edition* at 709, 711-12 (effective 2/1/76 to 2/15/76). Sylvia Mendenhall had no choice but to fly another carrier from Detroit to Pittsburgh.

The "transfer of airlines" characteristic does not appear to have been relied upon by the government in any other "profile" case. See *United States v. Westerbann-Martinez*, 435 F. Supp. 690 (E.D. N.Y. 1977).

¹² See, Supplemental Brief for the United States, Rehearing En Banc, at 23, *United States v. Mendenhall*, 596 F.2d 706 (6th Cir. 1979).

Indeed, it conflicts with testimony given by DEA agents in other cases that the profile includes taking direct flights from specified cities. See *United States v. Floyd*, 418 F. Supp. 724, 725 (E.D. Mich. 1976); *United States v. Rogers*, 436 F. Supp. 1, 3 (E.D. Mich. 1976).¹³

The purported rationale for the transfer factor is that drug couriers frequently change airlines and flight times to guard against the risk that someone has given the authorities a tip that a narcotics courier would be arriving in a given city on a particular flight. Here this factor evaporated completely prior to the stop of Sylvia Mendenhall:

(1) The agent knew that Sylvia Mendenhall needed only a boarding pass to board the Eastern flight. (A. 11)

(2) He was not aware of the airline routing to Pittsburgh. (A. 17)

(3) American Airlines did not fly from Detroit to Pittsburgh on February 10, 1976.¹⁴

Hence, the fact that Sylvia Mendenhall was ticketed to Pittsburgh on an Eastern flight afforded the agent no basis for concluding that anything suspicious was afoot.

Lack of Baggage. Sylvia Mendenhall's failure to

¹³ The search involved in *Rogers* occurred at Detroit Metropolitan Airport on February 2, 1976, only eight days prior to the search involved in the instant case.

¹⁴ The proper police practice in this case would have been to continue the investigation rather than to detain a citizen. Neither agent sought to determine the flight schedule to see if the lack of baggage and transfer of airlines factors were of any true significance. One of the two agents could have left the surveillance to check these facts. Indeed both agents should have permitted her to board the Eastern flight, continued to check for incriminating facts, and wired these facts to DEA agents in Pittsburgh. See e.g., *United States v. Oates*, 560 F.2d 45 (2nd Cir. 1977); *United States v. Lewis*, 556 F.2d 717 (6th Cir. 1977); *United States v. Canales*, 572 F.2d 1182 (6th Cir. 1978).

claim baggage during her airline transfer to Detroit also has no significance in determining the reasonableness of the stop. Although the agent contended that this "profile factor" was significant at first, the agent made no claim that it was of continuing significance once he discovered Sylvia Mendenhall was flying through to Pittsburgh.

In the airline transfer context, the then applicable airline tariff agreement provided that baggage checked at the origin point through to the final destination would be transported by the original airline and then transferred by that carrier to the subsequent carrier.¹⁵ In the present case Sylvia Mendenhall's baggage would have been checked from Los Angeles to Pittsburgh by the original airline, American Airlines. Upon arrival of the flight in Detroit, American was obligated by law¹⁶ to transfer this baggage to Eastern Airlines, the carrier flying from Detroit to Pittsburgh. Sylvia Mendenhall, therefore, had no opportunity to obtain her baggage in Detroit, even had she desired to do so.

The evaporation of the baggage factor should have been apparent to the agent once he became aware that Sylvia Mendenhall was continuing on to Pittsburgh and needed only a boarding pass for access to the Eastern flight to Pittsburgh.¹⁷ Common sense alone,

¹⁵ C.A.B. No. 142, Local and Passenger Rules Tariff No. PR-6, Rule 350, at 157, 69th Revised (effective 2/10/76 — 2/24/76).

¹⁶ Tariff rules which are required to be filed with the Civil Aeronautics Board, pursuant to 49 U.S.C. §1373 (a), have the force of law. *City Messenger Service of Hollywood, Inc. v. Capitol Records Distributing Corp.*, 446 F.2d 6 (6th Cir. 1971).

¹⁷ Although the agent thought that the lack of baggage was significant at one point of his observation of Sylvia Mendenhall, he appears to have recognized that this factor evaporated prior to the stop in this case. (A. 16)

apart from the applicable regulations, should have indicated to this experienced agent that under the circumstances Sylvia Mendenhall's baggage would be checked through to her final destination by the airlines.

Thus, the agents had only the following factors to justify the stop, arrest and search of Sylvia Mendenhall: (1) she was on a flight from Los Angeles to Detroit; (2) she was the last passenger to get off the airplane; and (3) upon deplaning, she appeared nervous to Agent Anderson and looked around the area where the agents were standing. These remaining factors are insufficient to provide justification to stop a citizen.

Flight from Los Angeles to Detroit. It seems that all urban centers are included as a profile factor depending on the search at hand. Since most citizens fly to and from urban centers, this factor has only minimal significance:

Similarly, travel from Los Angeles cannot be regarded as in any way suspicious. Los Angeles may indeed be a major narcotics distribution center, but the probability that any given airplane passenger from that city is a drug courier is infinitesimally small. Such a flimsy factor should not be allowed to justify—or help justify—the stopping of travellers from the nation's third largest city. See *United States v. McCaleb*, *supra* at 720; *United States v. Scott*, 545 F.2d 38, 40 n.2 (8th Cir. 1976), *cert. denied*, 429 U.S. 1066, 97 S.Ct. 796, 50 L.Ed.2d 784 (1977). Moreover, our experience with DEA agent testimony in other cases makes us wonder whether there exists any city in the country which a DEA agent will not characterize as either a major narcotics distribution center or a city through which drug couriers pass on their way to a major narcotics distribution center.

United States v. Andrews, 600 F.2d 563, 566-67 (6th Cir. 1979).

Last Off the Airplane. Agent Anderson testified that it was significant to him that Sylvia Mendenhall was the last to deplane because "[t]hey can see who is left behind or who may be watching them." (A. 9) However, it is as likely that drug couriers would want to be crowded into the middle of the line in order to avoid attracting attention.

The agent did acknowledge that on every flight from Los Angeles someone has to be the last off the plane. (A. 15) More significant, however, is that this alleged courier characteristic has apparently not been present in any other "profile" case. See *United States v. Westerbann-Martinez*, 435 F. Supp. 690, 698 (E.D. N.Y. 1977).

Nervousness. The extent to which it is common for travellers to be nervous and to exhibit signs of nervousness because of innate personality traits, fear of airplane travel, or any number of other reasons renders this factor very insignificant. As the Sixth Circuit has noted:

We agree with the district court that nervousness by two of Andrews' companions should be entitled to no weight. Nervousness is entirely consistent with innocent behavior, especially at an airport where a traveller may be anticipating a long-awaited rendezvous with friends or family.⁴ See *United States v. McCaleb*, 552 F.2d 717, 720 (6th Cir. 1977); *United States v. McClain*, 452 F. Supp. 195, 200 n.3 (E.D. Mich. 1977).

⁴ In other contexts, the government has argued the nervousness factor in various ways. For example, in *United States v. Escamilla*, 560 F.2d

1229, 1233 (5th Cir. 1977) the court noted that at times the government argues that it was suspicious for the occupants of a vehicle in the border zone to react nervously when a patrol car passed, while at other times the government argues that it was suspicious if the occupants just looked at the road and did not acknowledge the patrol car. Similarly, in *United States v. Himmelwright*, 551 F.2d 991, 992 (5th Cir. 1977), the government argued that it was suspicious that a woman was excessively calm while going through customs.

United States v. Andrews, *supra*, at 566.¹⁸

The agents possessed no facts which even approach justification for the stop of a citizen. There are no cases upholding investigatory stops on facts like these. One Fifth Circuit case, *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978) involved facts similar to those at hand:

Because as discussed above, we give little weight to the amount of luggage carried by Ballard, and the suspicion that he arrived from Los Angeles, Ballard's supposed nervousness and his walking pace are the only substantial factors offered to justify the search, and we would be most reluctant to hold that the police can stop anyone exhibiting only those two characteristics. We conclude that Offi-

¹⁸ In *United States v. Westerhann-Martinez*, 435 F. Supp. 690 (E.D. N.Y. 1977), the court noted that the "nervousness" observed in that case was not the kind of specific and articulable fact and inference necessary to support an investigative stop:

This court is not prepared to user in the day in this country, when, without stronger objective incriminatory evidence, any person may be subject to a police stop after arriving by plane in an airport merely because an agent subjectively concludes that repeated looking around is a manifestation of nervousness.

Id. at 699.

cer Donald did not have reasonable suspicion to stop Ballard and that, therefore, the stop was in violation of the fourth amendment.

573 F.2d at 916.

These three flimsy factors do not constitute the kind of reasonable suspicion envisioned by *Terry v. Ohio*, 392 U.S. 1 (1968) and its progeny. *Terry* allows police to stop and investigate a citizen only if there are specific and articulable facts which would create a reasonable suspicion that criminal activity is afoot:

Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.

Id. at 22.

Similar to the circumstances of *Brown v. Texas*, — U.S. —, 99 S.Ct. 2637 (1979), the flaw in the government's case is that none of the circumstances preceding the stop of Sylvia Mendenhall established a reasonable suspicion that she was involved in criminal conduct. Someone must be last off each and every flight. Most persons tend to fly to and from major cities, and because of infinite reasons, including the flight itself, many appear nervous.

B. The Seizure without Reasonable Suspicion Was Complete and Defendant's Liberty Was Restrained When She Was Required to Give Federal Agents Her Driver's License Which Was Held by the Agents While Defendant Was Required to Continue to Answer Questions and Thereafter Required to Give Federal Agents Her Airplane Ticket.

The seizure in this case was complete when the agent approached Sylvia Mendenhall and invoked his au-

thority as a federal officer to require that she produce identification from her purse. Upon receiving her driver's license, he retained it, while insisting that she produce her airline ticket for his inspection as well. (A. 12)¹⁹ This conduct hardly constitutes a simple police-citizen encounter where the agent has conducted himself "in a manner consistent with what would be viewed as a non-offensive contact if it occurred between two ordinary citizens."²⁰ It is likely that most people would be quite offended if a stranger approached, required identification and then retained that identification while demanding proof and an explanation of one's itinerary.

In *Terry v. Ohio*, *supra*, the Court found it unnecessary to determine if the seizure occurred prior to the time the officer grabbed Terry. (392 U.S. at 19, n.16) Prior to that action the officer had approached Terry and his companions on the street, identified himself as a police officer and asked for their names. *Id.* at 7. A simple request for a name is an action of considerably different quality than insisting that a citizen produce identification, hand it over to the officer, and produce her airline ticket while the officer retains possession of the driver's license. "Whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person." *Id.* at 16; *United States v. Brignoni-Ponce*, 422 U.S. 873, 877 (1975). Sylvia

¹⁹ The Second Circuit Court of Appeals also found that an investigative stop had been made when agents approached a citizen outside an airport, identified themselves, and requested identification from the citizen with the citizen handing over his driver's license and airplane ticket at the same time. *United States v. Vasquez-Santiago*, 602 F.2d 1069 (2nd Cir. 1979).

²⁰ 3 W. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment*, § 9.2 at 53 (1978).

Mendenhall could not have reasonably believed that she was free to leave at this point.

In *Brown v. Texas*, — U.S. —, 99 S.Ct. 2637 (1979), the Court analyzed the constitutional significance of stopping and demanding identification from an individual:

When the officers detained appellant for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment.

Id. at 2640.

Brown makes it clear that when the agents stopped Sylvia Mendenhall and required and retained her identification a seizure subject to the requirements of the fourth amendment had occurred.

In recent years, the Court has rejected claims that particular societal interest justify intrusion into the personal liberty, security and privacy guaranteed by the fourth amendment. For example, the Court has rejected efforts to dispense with the safeguards of the fourth amendment based on the "vital public interest in the prompt investigation of the extremely serious crime of murder," *Mincey v. Arizona*, 437 U.S. 385 (1978); the public interest in fire investigation, *Michigan v. Tyler*, 436 U.S. 499 (1978); and the public interest in occupational safety, *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978).

Unfettered discretion to stop citizens at will cannot be justified. The fact that observed behavior is innocuous cannot serve as the justification for an intrusion. The courts of appeals have looked at these factors of the "drug courier profile"—Los Angeles, nervousness and glancing around—and have rejected stops based only on such innocuous characteristics.

C. The Drug Courier Profile Does Not Overcome Defendant's Fourth Amendment Protections.

The government relies upon the DEA agents' "drug courier profile" in contending that the facts known about Sylvia Mendenhall at the time she was stopped, rose to a level of "reasonable suspicion." This "profile" is a rather loosely formulated list of unwritten characteristics used by agents to indicated "suspicious persons" who are travelling to or from cities believed by the DEA to be drug "source" cities.²¹ Each court of appeals that has analyzed this courier profile agrees that the courier profile in an insufficient basis to justify an investigative stop. *United States v. Ballard*, 573 F.2d 913 (5th cir. 1978); *United States v. McCaleb*, 522 F.2d 717 (6th Cir. 1977); *United States v. Rico*, 594 F.2d 320 (2nd Cir. 1979). See also *United States v. Cortez*, 595 F.2d 505 (9th cir. 1979); *United States v. Klein*, 592 F.2d 909 (5th Cir. 1979). As one district court has noted, the profile has "a chameleon-like quality: it seems to change itself to fit the

²¹ Among the "source" cities which have been identified are: New York, San Diego, Miami, Los Angeles, Dallas-Ft. Worth, San Juan, Chicago and Detroit. See e.g. *United States v. Vasquez-Santiago*, 602 F.2d 1069 (2nd Cir. 1979); *United States v. Price*, 599 F.2d 494 (2nd Cir. 1979); *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979); *United States v. Rico*, 594 F.2d 320 (2nd Cir. 1979); *United States v. Craemer*, 555 F.2d 594 (6th Cir. 1977); *United States v. Allen*, 421 F. Supp. 1372 (E.D. Mich. 1976); *United States v. Van Lewis*, 409 F. Supp. 535 (E.D. Mich. 1976). At the evidentiary hearing in *United States v. Camacho*, argued en banc with the instant case, the agent identified Phoenix and Tucson as also being among the "source" cities. (C.A. App. at 39)

It is questionable as to "whether there exists any city in the country which a DEA agent will not characterize as either a major narcotics distribution center or a city through which drug couriers pass on their way to a major narcotics distribution center." *United States v. Andrews*, 600 F.2d 563 (6th Cir. 1979).

facts of each case.”²² Indeed, from an examination of the reported cases arising out of Detroit,²³ and other cities,²⁴ it seems clear that it is a rare airline passenger who would not

²² *United States v. Westerhann-Martinez*, 435 F. Supp. 690, 698 (S.D. N.Y. 1977).

²³ The characteristics of the profile used at Detroit Metropolitan Airport, as testified to by agents in the reported cases, have included, *inter alia*, taking direct flights to and from specified cities; staying in destination cities for a very short period of time; use of small denomination currency for ticket purchases; absence of luggage; insufficient luggage; use of empty or nearly empty suitcases; nervousness; traveling alone and being met by no one at the airport; directly leaving the airport in a hurried and nervous manner; furnishing a false number to an airline when a telephone contact is requested; meeting with known drug dealers; attempting to conceal the fact that someone is traveling with them or that someone may be waiting for them; making a telephone call after deplaning; and, exiting at a level where there is no public transportation. See e.g. *United States v. Smith*, 574 F.2d 882 (6th Cir. 1978); *United States v. Lewis*, 556 F.2d 385 (6th Cir. 1977); *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977); *United States v. Chambliss*, 425 F. Supp. 1330 (E.D. Mich. 1977); *United States v. Allen*, 421 F. Supp. 1372 (E.D. Mich. 1976); *United States v. Floyd*, 418 F. Supp. 724 (E.D. Mich. 1976).

²⁴ In addition to many of the characteristics listed *supra*, agents involved in searches at other airports have testified that their courier profiles included, *inter alia*, passengers of Hispanic origin (especially Mexicans); excessively frequent travel to “source” or “distribution” cities; the use of public transportation in departing the airport, particularly taxicabs; an unusual itinerary; purchasing a one-way ticket; carrying luggage without the identification tags required by federal regulations; travel by a known narcotics trafficker; dressing differently from the usual pattern of dress on the flight; use of cash of small or large denominations to purchase tickets; leaving the airport immediately; and, whispered conversation with a friend. See e.g. *United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979); *United States v. Rico*, 594 F.2d 320 (2nd Cir. 1979); *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978); *United States v. Craemer*, 555 F.2d 594 (6th Cir. 1976); *United States v. Westerhann-Martinez*, 435 F. Supp. 690 (E.D. N.Y. 1977); *Bowers v. State*, 57355 (Ga. App. 6/28/79).

satisfy at least some of the "profile" characteristics.²⁵

The courts of appeals have realized that there is no airport traveller exception to the fourth amendment and that recognition of the power sought by the government here would sanction not only stops at airports but anywhere in the country. The number of "profiles" could be increased to allow federal agents to search anyone at any time. Recently, the Ninth Circuit has rejected random searches by use of both an "alien courier profile," *United States v. Cortez*, 595 F.2d 505 (9th Cir. 1979) and a "stolen vehicle profile," *United States v. Carrizosa-Gaxiola*, 523 F.2d 239 (9th Cir. 1975). Likewise, the Fifth Circuit has held that resemblance to a "smuggling profile" does not determine the constitutional validity of a search since that depends on the facts of each case. *United States v. Klein*, 592 F.2d

²⁵ The near impossibility of any passenger failing to satisfy at least some of the "profile" characteristics is due, in part, to the agents' ability to find satisfaction of a "profile factor" regardless of what the factual situation is. Thus, if a passenger takes a direct flight he is said to have satisfied a "factor" in the "profile." If, however, as in the instant case, a passenger does not take a direct flight, he is also said to have satisfied a "factor."

This "heads I win, tails you lose" situation is characteristic of the "drug courier profile." Regardless of what city the passenger comes from, it is claimed to be a major narcotics distribution center. If the passenger pays for his ticket with small denomination currency, he has satisfied a "factor" in the "profile." If he uses currency of large denomination, he has also satisfied a "factor." If he has no luggage, little luggage, or too much luggage, a "factor" has been satisfied. If the passenger makes a telephone call, he has satisfied a "factor." But, if he leaves the airport immediately, he has also satisfied a "factor." If he leaves the airport at a level where there is no public transportation, he has satisfied a "factor." If he leaves the airport at a level where there is public transportation, and uses it, he has also satisfied a "factor." See *supra*, p. 42, nn/22-24.

909 (5th Cir. 1979).²⁶

For purposes of this case, however, the record does not even fit the the "drug courier profile." Of all the factors that have been listed in the reported cases, the government has been able to articulate only three in this case. No court of appeals drug courier profile case has upheld a stop, arrest and search of a citizen on facts like these.

Similar to the broad applicability of the Mexican ancestry factor relied on by the agents in *United States v. Brignoni-Ponce*, *supra*, the satisfaction of the literally endless number of unwritten airport profile factors will occur in a very large number of airline passengers. The government's quest here seems to be to eliminate the case-by-case approach and to obtain permission to search at will by judicial fiat. This our constitution does not allow:

"[To] argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purpose of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harrassment and ignominy incident to involuntary detention. Nothing is more clear than the Fourth

²⁶ Cases involving the use of a "skyjacker's profile" provide no support for the government's position in this case.

The profile has not been officially used since January, 1973 at which time the Federal Aviation Administration ordered that all carry-on baggage must be searched and all passengers must be screen by the magnetometer. See *United States v. Davis*, 482 F.2d 893, 900 (9th Cir. 1973).

Further, no reported "skyjacker profile" case has permitted a search of the person based solely on the profile. See e.g. *United States v. Ruiz-Estrella*, 481 F.2d 723, 726, 729 (5th Cir. 1973). Rather, the courts have consistently required a positive magnetometer reading and other information, such as an informant's tip, in addition to the profile.

Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions'"

Dunaway v. New York, 99 S.Ct. at 2257 citing *Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969). See also *Ybarra v. Illinois*, ___ U.S. ___, 48 U.S.L.W. 4023 (U.S. Nov. 28, 1979).

Although the courts of appeals have refused to grant carte blanche permission to stop and search citizens with the mere incantation of "airport drug courier profile," the courts have considered every fact known to a policeman in determining the legality of a search. The officer's experience factor has been set out, argued, briefed, reiterated at length and considered in case after case.

In the Sixth Circuit Court of Appeals dozens of searches have been upheld or struck down thus far.²⁷ *United States v. Lewis*, 556 F.2d 385 (6th Cir. 1977) has provided guidelines for probable cause arrests, while *United States v. Canales*, 572 F.2d 1182 (6th Cir. 1978) has defined articulable reasonable suspicion in upholding an airport search:

Obviously, reasonable agents would recognize that Canales' travelling was potentially innocent and capable of explanation. However, their reasonable suspicions independently founded provided a sufficient nexus between the defendant's present

²⁷ Reported decisions upholding searches include: *United States v. Lewis*, 556 F.2d 385 (6th Cir. 1977); *United States v. Canales*, 572 F.2d 1182 (6th Cir. 1978); *United States v. Pope*, 561 F.2d 663 (6th Cir. 1977); *United States v. Smith*, 574 F.2d 882 (6th Cir. 1978); *United States v. Gill*, 555 F.2d 597 (6th Cir. 1977); *United States v. Andrews*, 600 F.2d 563 (6th Cir. 1979). Reported decisions refusing to uphold searches include: *United States v. Craemer*, 555 F.2d 594 (6th Cir. 1977); *United States v. Hunter*, 550 F.2d 1066 (6th Cir. 1977); *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977).

behavior and criminal activity to justify the stop as the government's attempt to determine that his activity was, in reality, innocent activity.

Id. at 1187.

United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977) does not hold or imply that probable cause is necessary for an investigative stop.²⁸ Rather, *McCaleb* recognized that profile factors must be evaluated on a case-by-case basis along with other facts in determining constitutional parameters:

While a set of facts may arise in which the existence of certain profile characteristics constitute reasonable suspicion, the circumstances of this case do not provide "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant[ed]" the intrusion of an investigatory stop. *Terry v. Ohio*, *supra*, 392 U.S. at 21; *United States v. Cupps*, 503 F.2d 277, 281 (6th Cir. 1974).

²⁸ In *McCaleb*, the government agents' stop of the defendant were based on the following:

- (1) Three persons arrived at Detroit Metropolitan Airport on a non-stop flight from Los Angeles.
- (2) One person was carrying a shoulder bag; the others carried no luggage.
- (3) Two of the persons were seen boarding a plane for Los Angeles the previous evening wearing the same clothes.
- (4) Two of the persons appeared nervous; one did not.
- (5) *McCaleb* claimed one bag.

Id. at 720.²⁹

United States v. Oates, 560 F.2d 45 (2nd Circ. 1977) is consistent with Sixth Circuit airport search authority, although it is a primary case cited by the government in support of government contentions. Oates' face and name were familiar to the detectives as known narcotics dealer. Daniels (Oates' companion) exhibited telltale characteristics of drug addiction during the long airplane flight from Detroit to New York. These factors, *inter alia*, were added to the bulges in Daniels' clothing, which the Second Circuit discussed, Saying, "here the bulges in Daniels' clothing were highly suspicious, and the officers were justified in at least feeling them to ascertain whether they wer in fact weapons." In the Sixth Circuit, *United States v. Lewis*, *supra*, and *United States v. Prince*, 548 F.2d 164 (6th Cir. 1977), would have been controlling, and the search would have been upheld.

²⁹ *United States v. McCaleb*, *supra*, was joined at the district court with *United States v. Van Lewis*, 409 F. Supp. 535, (E.D. Mich. 1976) *aff'd* 556 F.2d 385 (6th Cir. 1977) for a hearing to scrutinize the statistical claims of agents working at Detroit Metropolitan Airport. The testimony given at that hearing involved the period from January 31, 1975 through February 8, 1976. Supplemental Appendix for Appellant at 7. *United States v. Mendenhall*, 596 F.2d 706 (6th Cir. 1979). Sylvia Mendenhall was arrested on February 10, 1976.

Because of the closeness of the dates involved, part of the *McCaleb* testimony was included in the Supplemental Appendix filed in the Sixth Circuit Court of Appeals en banc hearing in this case. It is worth noting that:

1. No records were kept as to how many consent searches took place where no contraband was found. Supplemental Appendix, *supra*, at 1.
2. It is impossible to determine how many successful searches resulted from use of the profile alone—an unspecified number of searches involved both the profile and either an informant's tip or some other unspecified type of independent corroboration. Supplemental Appendix, *supra*, at 5, 6.

D. The Degree of Restraint Imposed on Defendant Exceeded That Permissible in an Investigatory Stop.

Even assuming, arguendo, that an investigatory stop of the defendant was permissible, the intrusion here went far beyond the parameters set by *Terry, supra*, and *Brignoni-Ponce, supra*. In *Terry*, the Court stated that the stop and inquiry must be "reasonably related in scope to the justification for their initiation." 392 U.S. at 29. *Accord, United States v. Brignoni-Ponce*, 422 U.S. at 878. Thus, a detention based on anything less than probable cause must be commensurately less intrusive in scope. "The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries." *Sibron v. New York*, 392 U.S. 40, 64 (1968). *Brignoni-Ponce* stated that "any further detention or search must be based on consent or probable cause." 422 U.S. at 878.

Even before the alleged consent to search was given, defendant was subjected to significant encroachments and restraints. Sylvia Mendenhall was led to a private room by two federal agents and her liberty was absolutely restrained. This was not the type of brief, modest intrusion envisioned by *Terry, supra*.³⁰ For this reason, the treatment of Sylvia Mendenhall by the agents constitutes an illegal seizure of her even if a less intrusive investigation would have been permissible.

E. The Fourth Amendment Does Not Allow Intrusions upon Free Passage and Personal Security through Unfettered Police Discretion.

Investigative detentions of uncounted number of

³⁰ It was nowhere contended that a search for weapons under *Terry* was involved.

citizens who evidence the unlimited number of unwritten changing characteristics of the airport drug courier profile necessarily entail substantial intrusions upon significant fourth amendment interests: the "right to free passage without interruption," *United States v. Martinez-Fuerte*, 428 U.S. 543, 557-58 (1976); *Carrol v. United States*, 267 U.S. 132, 153-54 (1925); "the right to personal security," *United States v. Brignoni-Ponce*, 422 U.S. at 878; and, "the right to privacy," *Terry v. Ohio*, 392 U.S. at 9..

The mere stacking of innocuous "profile" characteristics is insufficient to overcome constitutional standards. The courts of appeals have required a real tie-in with criminal activity. Simple good faith on the part of the arresting officer is not enough on which to base the stop of a citizen who is the last person off a flight from Los Angeles and who appears to be nervous while looking about the deplaning area.

This Court has made it clear in *Terry* that "[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects, only in the discretion of the police.'" 392 U.S. at 22.

III.

THE CONSENT TO SEARCH GIVEN BY DEFENDANT WAS INVALID WHERE THE CONSENT WAS NOT VOLUNTARY AND WAS THE PRODUCT OF AN ILLEGAL DETENTION.

The strip search of Sylvia Mendenhall's person was not supported by probable cause. The search can only

be upheld if the "consent" to search was freely and voluntarily given and was not the product of an illegal detention.

It is the position of the defendant that the consent followed a stop without reasonable suspicion and an arrest without probable cause. A consent resulting from the exploitation of an illegal detention is invalid under *Brown v. Illinois*, 422 U.S. 590 (1975), regardless of the voluntariness of the consent. Further, the circumstances in this record also fail to demonstrate a consent voluntarily given.

A. The Alleged Consent Was Not Freely and Voluntarily Given.

When the government seeks to rely upon consent to justify the lawfulness of a search, it has the burden of proving that the consent was, in fact, freely and voluntarily given. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). The fourth amendment requires that the government demonstrate that the consent was not the result of duress or coercion, express or implied. *Schneckloth v. Bustamonte*, 412 U.S. 212, 248 (1973).

In *Bumper*, the defendant's grandmother had allowed a search of her home after officers claimed they had a search warrant. Despite the woman's own testimony that the consent was "all my own free will" the Court refused to uphold the "consent" search: "[W]here there is coercion there cannot be consent." 391 U.S. at 550.

The Court in *Schneckloth* held that the voluntariness of a consent must be determined from the totality of all the circumstances. The Court upheld the search of a motor vehicle where the operator gave verbal consent, obtained the keys and opened the trunk for the officers, and where, according to uncontradicted testimony, "it was all very congenial at the time." The Court stated:

In this case, there is no evidence of any inherently coercive tactics—either from the nature of the police questioning or the environment in which it took place. Indeed, since consent searches will normally occur on a person's own familiar territory, the specter of incommunicado police interrogation in some remote station house is simply inapposite. 412 U.S. at 247.

The setting in which Sylvia Mendenhall allegedly gave consent to a search of her person is in sharp contrast to that in *Schneckloth*. The airport program, by design and implementation, seeks to obtain consent for searches of the person and luggage which would otherwise be impermissible for lack of probable cause.³¹ The agents bring their suspects into an unfamiliar and coercive setting to obtain the consent. The suspect can only believe that he or she will be forcibly searched, or held indefinitely, unless the consent to search is given.

Sylvia Mendenhall was stopped by two men as she walked down a concourse to board a plane to Pittsburgh. The men identified themselves as federal agents, questioned her, and required the production of her identification and airline ticket. (A. 11)

The two federal agents subsequently ushered Sylvia Mendenhall into the private, locked office of the Drug Enforcement Administration. (A. 12)³² They never informed her that she would be free to catch her plane nor even inquired when her flight was leaving. According to the testimony of Agent Anderson: "I asked her for her consent to search her person as well as her

³¹ See Government's Petition for Rehearing With Suggestion for Rehearing En Banc at 7, *United States v. Mendenhall*, 596 F.2d 706 (6th Cir. 1979).

³² As Sylvia Mendenhall was not present at the evidentiary hearing the only account of what occurred was that of the agents.

handbag. I stated to her that she had the right to decline the search if she so desired. Her response was 'Go ahead.'" (A. 12) Sylvia Mendenhall had no reason to believe that if she refused to consent, she would be released or would not be forcibly searched.

After a search of Sylvia Mendenhall's purse failed to uncover anything illegal the agents awaited the arrival of a female police officer. (A. 12) When Officer Beverly Mercier of the Metro Airport Police Department arrived, she gave the agents her gun and accompanied Sylvia Mendenhall into a separate room within the DEA office. (A. 24)

According to Officer Mercier, Sylvia Mendenhall was asked if she consented to the search and replied that she did. Officer Mercier then said, "It's a strip search. That means everything comes off." (A. 24) This was the first time that Sylvia Mendenhall was informed that there was to be a full strip search.

It was at this point that Sylvia Mendenhall told the officer that she had a plane to catch. (A. 24) If any consent can be deemed to have been given previously, this constituted a revocation. She was never told that she was free to catch her plane. Rather, she was told that "if you don't have anything on you, you don't have any problem." (A. 24) In fact, had she attempted to leave the DEA office she would have been stopped. (A. 21)

Sylvia Mendenhall kept repeating that she had a plane to catch as she began to undress at the direction of Officer Mercier. (A. 24, 27)

The Court has recognized that the "possibly vulnerable subjective state of the person who consents" must be taken into account in examining all the surrounding circumstances to determine if, in fact, the consent to search was coerced. *Schneckloth v. Bustamonte*, *supra*

at 229. The defendant here was 22 years old. She had an eleventh grade education. (A. 13) Of particular importance here, however, was Sylvia Mendenhall's state of mind at the time of granting "consent" to the search. Agent Anderson testified that, immediately prior to going to the DEA office, he informed her that he was a federal narcotics agent, and "[s]he became quite shaken, extremely nervous. She had a hard time speaking." (A. 11-12) It was at this point that Sylvia Mendenhall was taken to the DEA office and gave "consent" to a search. Additionally, Sylvia Mendenhall had not been informed that it would be a woman, rather than Agent Anderson, who would actually perform the search of her person. It is incredible that Sylvia Mendenhall would freely and voluntarily consent to a full strip search that she could only believe would be performed by the male agent.

In *Schnëckloth*, the Court admonished that:

[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion were applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.
412 U.S. at 228.

Sylvia Mendenhall was subjected to serious physical restraints and psychological pressure. She was stopped by federal agents in a public airport and taken to their private and locked office where she faced the prospect of indefinite detention. She protested that she had a plane to catch even as the search continued. Given the surrounding circumstances, as well as her own subjective state, her consent, if given, was not the product of a free will.

B. The Alleged Consent Was the Product of an Illegal Detention.

The "consent" cannot support the search here for a related, but independent, reason. The "consent" followed a stop without reasonable suspicion and an arrest without probable cause. It was given during an illegal detention. There was no intervening factor of significance to dissipate the taint of the illegal detention. Rather, the "consent" was the direct product of the illegal stop and arrest.

In *Wong Sun v. United States*, 371 U.S. 471 (1963) a statement by defendant James Toy followed an illegal arrest. The Court held the statement inadmissible where it did not result from "an intervening independent act of free will," and was not "sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Id.* at 486.

A confession was obtained following an arrest without probable cause in *Brown v. Illinois*, 422 U.S. 590 (1975). Finding the relevant inquiry to be "whether Brown's statements were obtained by exploitation of the illegality of his arrest," *id.* at 600, the Court held that there was "no intervening event of significance whatsoever," *id.* at 605, despite the giving of *Miranda* warnings and a lapse of two hours from the illegal arrest before the incriminating statement was made. The same result was recently reached under similar facts in *Dunaway v. New York*, ___ U.S. ___, 99 S.Ct. 2248 (1979).

Brown and *Dunaway* identified several factors in determining whether a confession obtained following an illegal arrest is admissible: (1) the temporal proximity of the arrest and confession; (2) the presence of intervening circumstances; and, (3) the purpose and flagrancy of the official misconduct. *Brown, supra* at

603-04; *Dunaway, supra* at 2259. A consideration of the facts of this case in light of these factors requires the conclusion that the "consent" cannot support the search.

The temporal proximity between the illegality and the discovery of the evidence is material in determining the admissibility of the evidence. *United States v. Ceccolini*, 435 U.S. 268 (1978). Here, the "consent" and subsequent search occurred within minutes of a stop not supported by reasonable suspicion, within minutes of an arrest not supported by probable cause, and while the illegal detention continued.

The only intervening circumstance claimed is that Sylvia Mendenhall, while in the locked DEA office, was informed of her right to refuse consent. In *Brown* and *Dunaway* the Court held that the detailed *Miranda* warnings were insufficient, without more, to dissipate the taint of an illegal arrest where a confession was sought to be introduced. Here, Sylvia Mendenhall was allegedly informed, on one occasion, that she did not have to consent to a search. She was never told, of course, that she was free to leave if she did not wish to consent. The reasoning of *Brown* and *Dunaway* is equally applicable in the present case. The brief warning given here, without more, was insufficient to dissipate the taint of the illegal detention.

The action of the agents here was also like that in *Brown* and *Dunaway* where the arrests without probable cause had a "quality of purposefulness" in that it was an "expedition for evidence" admittedly undertaken "in the hope that something might turn up." *Brown, supra* at 605; *Dunaway, supra* at 2259. Additionally, actions by agents at Detroit Metropolitan Airport, similar to those in the instant case, had been condemned by the United States District Court for the Eastern

District of Michigan prior to the arrest here.³³

When evidence is obtained following illegal activities by the police the burden of proving admissibility rests on the prosecution. *Brown, supra* at 604. Further, "... when there is a close causal connection between illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts." *Dunaway, supra* at 2259.

The consent to a strip search given by Sylvia Mendenhall here, like the incriminating statements made by defendants in *Brown* and *Dunaway*, was obtained by the exploitation of the illegal arrest.

C. The Court of Appeals Correctly Held That the Alleged Consent Was Invalid.

In its opinion in this case and *United States v. Camacho*, 596 F.2d 706 (6th Cir. 1979), the court of appeals, en banc, found "that in neither case was there valid consent to search within the meaning of *United*

³³ See e.g., *United States v. Bryant*, 406 F. Supp. 635 (E.D. Mich. 1975); *United States v. Pruss*, Cr. No. 5-81244 (E.D. Mich. 1/14/76); *United States v. Hunter*, Cr. No. 5-81318 (E.D. Mich. 2/4/76).

In *Bryant, supra*, DEA agents had escorted the defendant to their office at the airport. The district court found that she was under "practical arrest," if not under formal arrest, that the agents did not possess probable cause, and that a "consent" to search her luggage was coerced rather than voluntary. *Id.* at 640.

In *Pruss, supra*, the district court found that the defendant, who had been ushered into a private office by agents at the airport, was arrested without probable cause and that his consent was involuntary where the detention had "all the earmarks of being designed to cause surprise, fright and confusion." *Id.* at 13.

States v. McCaleb, 552 F.2d 717 (6th Cir. 1977)." 596 F.2d at 707.

In *McCaleb*, the Sixth Circuit refused to uphold a search where the "consent" was obtained after the defendants were stopped without reasonable suspicion and taken into an office within the airport by agents. The *McCaleb* opinion cited *Wong Sun v. United States*, *supra*, and *Brown v. Illinois*, *supra*, in requiring the government to meet the heavy burden of establishing that the "consent" of an illegally detained person attenuated the taint of the illegality. Citing *Schneckloth v. Bustamonte*, *supra*, *McCaleb* held that the government had failed to establish that the "consent" was "freely and voluntarily" given. *United States v. McCaleb*, 552 F.2d at 721.

The Sixth Circuit has correctly applied the established law of this Court to the airport search context. Whether the "consent" is considered under the "totality of the circumstances" test of *Schneckloth* or under the "fruit of the poisonous tree" doctrine of *Wong Sun*, *Brown*, and *Dunaway*, the search here must fail. A person in the position of Sylvia Mendenhall could not reasonably believe that she had any choice but to submit to a strip search. A "consent" by such a person, without a showing that it was truly a free and voluntary decision and absent any intervening circumstances of any significance, cannot justify a search conducted without probable cause.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

SYLVIA L. MENDENHALL

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
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Washington, D.C. 20530



In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

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*ON WRIT OF CERTIORARI TO THE UNITED STATES
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REPLY BRIEF FOR THE UNITED STATES

1. Amicus American Civil Liberties Union (ACLU) contends (Br. 8-10) that a "seizure" within the meaning of the Fourth Amendment automatically occurs whenever a police officer begins to question an individual whom he suspects of criminal activity, unless the officer tells the individual that he is free to ignore the questions.¹ In support of this argument, the ACLU observes (Br. 10) that it is fair to resolve any ambiguity in favor of finding a seizure because the officer has it in his power to dispel the ambiguity of the situation by informing the individual of his or her right to leave or to

¹Respondent suggests (Br. 39 n.19) that the very conduct involved here of asking to see a driver's license and airline ticket was held to constitute a seizure in *United States v. Vasquez-Santiago*, 602 F. 2d 1069 (2d Cir. 1979). This contention is erroneous. The court there did not discuss whether a seizure had occurred.

decline cooperation with the inquiry. Apart from the fact that the individual is equally able to clarify any ambiguity by inquiring about his freedom to leave, the ACLU position is not supported by any prior decision of this Court.² Indeed, the position it urges is in substance the same as the contention rejected in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), that the validity of a consent to search should be conditioned upon an explanation of the right to withhold consent.

Moreover, there is no sound reason in Fourth Amendment policy for creating a presumption that encounters between law enforcement officers and individuals whose behavior they find suspicious constitute a seizure. It may be that some citizens cooperate with brief questioning by police because they feel obliged to defer to authority. This cooperation assists law enforcement officers in the performance of their duties, and the Fourth Amendment does not require that officers discourage such cooperation. As the Court said in *Terry v. Ohio*, 392 U.S. 1 (1968), a seizure occurs "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." 392 U.S. at 19 n.16.

The ACLU also contends (Br. 10) that the circumstances here demonstrate that respondent felt compelled to answer the agents' questions because otherwise she would not have acted so contrary to her self-interest. This inference is not a proper one; it amounts to a suggestion that any consent or confession

²In *Sibron v. New York*, 392 U.S. 40 (1968), for instance, the Court deemed it an open question whether the initial encounter between Sibron and the officer constituted a seizure of Sibron's person, although the officer had given no warning such as the ACLU suggests would be a necessary predicate to a finding that an encounter was not a Fourth Amendment seizure.

by an individual that eventually turns out not to be advantageous to him should be deemed to be the product of coercion. The ACLU also notes (Br. 9-12) that individuals may feel compulsion because of subtle nuances of tone and gesture that are difficult for courts to weigh, and that here the subjective intent of the agents to stop her if she attempted to leave must have been communicated to respondent by such gestures. We agree that in some cases individuals may react to subtleties in tone and gesture that are difficult to articulate, just as experienced agents may suspect individuals of criminal activity based on subtle behavior that is difficult to articulate, and we do not suggest that an individual must point to "significant menacing conduct" in order to support a contention that the objective circumstances were such that he reasonably believed that he was not free to leave. We do contend that in the absence of any evidence that an individual should have felt compelled to answer an officer's questions, a seizure should not be held to have occurred. This is a question of fact for the trial court, and nothing in the record of this case indicates that respondent felt or should have felt compelled, by subtle behavior or otherwise, to answer the agent's questions.³

³The question whether an ambiguous encounter should be held to constitute a seizure may depend in part on whether the circumstances are viewed from the perspective of a law-abiding citizen who has been approached with an inquiry by the police or from the perspective of one engaged upon a course of criminal conduct and fearing detection. The approach of the ACLU stresses the likely reaction of the latter type of individual (see Br. 10-11). In our view, however, the matter should be examined through the eyes of one who has committed no crime and has nothing to hide from the officers who approach him. While wrongdoers as well as law-abiding citizens are entitled to the protection of the Fourth Amendment, the primary focus is properly on whether a challenged police action

2. We have consistently contended that whether a police officer may stop (*i.e.*, temporarily "seize") an individual for questioning always depends upon the totality of the circumstances. The officer must have reasonable suspicion that an individual is engaged in criminal activity before he is entitled to make a stop. In making this determination, however, an officer is entitled to rely on his experience, which may enable him to ascribe suspicious significance to behavior that might appear wholly innocent to an untrained observer. See *Brown v. Texas*, No. 77-6673 (June 25, 1979), slip op. 4 n.2; *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975). We contend that an officer is similarly entitled to rely on the collective experience of his colleagues. In the context of DEA airport surveillance, an informal compilation of collective expertise, known as a "drug courier profile," is used by agents as an aid in detecting couriers. But this case is not about the abstract validity of such profiles. We contend simply that a court, in assessing whether facts relied upon by an agent are sufficient to support an investigative stop, should not ignore the fact that certain characteristics of an individual that are observed by the agent, which may be innocent on their face, coincide with characteristics that have been determined by DEA agents to be common among drug couriers.

unreasonably invades individual privacy by search or seizure. Stops based upon reasonable suspicion do not require probable cause; by hypothesis, therefore, a majority of those persons who are "seized" in such cases will have committed no crime. It is accordingly appropriate, in determining whether a given encounter constitutes a Fourth Amendment "seizure," to ask whether the law-abiding citizen so approached would reasonably conclude that he had been deprived of his freedom of movement, rather than to focus upon how one with a guilty conscience would view the same encounter.

Thus the ACLU (Br. 6) completely misunderstands our position in describing it to be that the reasonable suspicion standard is met "whenever an individual exhibits one or more of the characteristics of [the] 'drug courier profile.'" Observation by an agent of certain characteristics and behavior of an individual may in some cases constitute reasonable suspicion whether coincidence with the drug courier profile exists or not; by the same token, reasonable suspicion may not exist in some cases even if a factor of the drug courier profile is observed. The inquiry still must be whether the totality of the circumstances warrants a reasonable suspicion of criminal activity. Thus respondent's (Br. 41-47) and the ACLU's (Br. 20-26, 41-50) contentions that the drug courier profile itself does not constitute reasonable suspicion do not squarely address the issue presented in this case.

The ACLU does contend (Br. 45-49) that the profile is entitled to no weight because its application is subject to the discretion of an agent who may apply it in a discriminatory manner. This contention is without merit. With the profile, as with any other evidence indicating criminal activity, the police officer must make a determination whether he has a reasonable suspicion of criminal activity that would justify a stop.⁴ This determination is judicially reviewable. The only discrimination sought to be made in making investigative

⁴This degree of suspicion occasioning an encounter with an airline passenger arises only infrequently. Respondent's suggestion (Br. 7) that one or more passengers on each arriving flight are stopped and questioned is completely without foundation. Similarly, the ACLU's reference (Br. 4 n.1) to South African police practices involving mass stops is grossly inapposite to the DEA airport program, in which only a tiny fraction of all passengers are stopped—and only when the particular individual has aroused an agent's suspicion.

stops pursuant to the DEA airport surveillance program is between individuals reasonably suspected of criminal activity and individuals who are not—the discrimination that is required by the Fourth Amendment.

In this case, the record reflects reasonable grounds for suspecting respondent of engaging in criminal activity. The agents had observed her deplane last and scan the entire terminal as if looking for someone. She appeared unusually nervous. They knew that she was arriving from Los Angeles, a major source city for narcotics. She appeared to have no luggage, a characteristic that the agents had found common among drug couriers. In addition, the record shows that the agents observed respondent changing her flight plans to a different airline while keeping the same destination.⁵ We submit that these facts gave the agents sufficient grounds for suspicion to justify the minimal intrusion, which we have argued did not amount to a seizure at all, of asking respondent if she would show the agents her driver's license and airline ticket.⁶

⁵Respondent belatedly asserts (Br. 32-33) that the Official Airline Guide indicates that the agents must have been mistaken in their observation that respondent was ticketed through to Pittsburgh on American Airlines. But even if American Airlines had no flight from Detroit to Pittsburgh, at this time it is impossible to tell whether respondent was originally ticketed to Pittsburgh on another airline or whether she was ticketed all along on Eastern Airlines. The record is clear, however, that the agents, the court and respondent's counsel (see A. 17, 34) all understood at the suppression hearing that respondent was attempting to change her flight at the Eastern counter, and the district court so found (Pet. App. 15a).

⁶Indeed, the district court found (Pet. App. 18a) that these facts, together with additional facts discovered prior to the search of respondent's person, gave the agents probable cause to arrest respondent.

The ACLU asserts (Br. 39) that respondent's behavior was more innocent than that "observed and found not to give rise to

3. Respondent contends (Br. 25-29) that the determination of when an arrest requiring probable cause occurs depends upon three factors, and that here those factors compel the conclusion that the detention of respondent in the DEA office required probable cause.⁷ First, respondent asserts that an arrest occurs whenever a person's freedom of movement is restrained. Manifestly, this cannot be the test, because *Terry* makes clear that a seizure that does not require probable cause still involves a restraint on movement. See 392 U.S. at 16. In any case, respondent's movement was not restrained at all.⁸

Second, respondent suggests that the purpose of the detention determines whether probable cause is needed. The purpose of a detention, of course, is relevant in considering whether the scope of the intrusion is reasonable under the Fourth Amendment, but the purpose itself does not determine whether probable cause is necessary. In any event, the purpose of the detention here was entirely proper and consistent with its status as

reasonable suspicion" in *Sibron v. New York*, *supra*, and *Terry v. Ohio*, *supra*. In fact, the Court held that the officer did have reasonable suspicion to make a stop in *Terry*. In *Sibron*, the Court found that the officer did not have cause to *search* the suspect, but it specified that the question of the validity of the stop upon less than probable cause for interrogation purposes was not presented. 392 U.S. at 60 n.20.

⁷This question arises, of course, only if the district court's finding (Pet. App. 16a) that respondent went to the office voluntarily is rejected. Respondent (Br. 21-23) points to nothing in the record that suggests that this finding is erroneous.

⁸Respondent's suggestion (Br. 19) that she was locked in the DEA office is completely without foundation. As with most offices, the DEA office was locked from the outside when the door was closed, but the door was not locked to someone inside the office who wished to leave.

a temporary seizure of a kind that does not require probable cause. Contrary to respondent's suggestion (Br. 27), the fact that the agents asked respondent for consent to search is consistent with the treatment of the encounter as a stop. If requesting consent to search converted an encounter into an arrest requiring probable cause, the concept of consent searches of suspects would be largely redundant. In situations where officers had probable cause, they could arrest a suspect and conduct a search incident to the arrest without consent; if they had no probable cause, the rule advanced by respondent would prohibit them from requesting consent because that would convert the detention into an arrest. Clearly, this Court has not sanctioned such a restriction on the ability of officers to seek consent to a search; to the contrary, the Court has specifically encouraged officers to seek consents to search when they lack probable cause. *Schneckloth v. Bustamonte*, *supra*, 412 U.S. at 227-228.⁹

Third, respondent argues that the length of a detention determines whether probable cause is necessary. As we have noted in our brief (Br. 60-61), the length of a detention is an important factor, and the six minute detention involved here is not so intrusive as to require probable cause. Respondent asserts (Br. 28) that the detention here was of indefinite duration because respondent would have been forced to wait until an attempt was made to get a search warrant if she refused consent. This assertion is incorrect. Nothing in the

⁹Respondent erroneously asserts that *Sibron v. New York*, *supra*, establishes that looking for narcotics is an improper purpose for an investigative stop. *Sibron* holds that a search for narcotics requires probable cause, even though an investigative stop may properly rest on reasonable suspicion; here, there was no search except by consent.

record suggests that the agents intended to detain respondent for any significant length of time if she refused consent, and it is clear that no such intention was ever communicated to respondent. In sum, the scope of the detention in this case was reasonable under the circumstances and was not sufficiently intrusive to require probable cause.

4. Respondent (Br. 50-53) and the ACLU (Br. 52-58) contend that respondent's consent to search was not voluntary under *Schneckloth v. Bustamonte*, *supra*. However, the record clearly indicates that the consent was voluntary, and the district court specifically found that the consent was "freely and voluntarily given" (Pet. App. 16a). The court of appeals did not purport to disturb this finding of fact on appeal; it held that there was no "valid consent to search within the meaning of *United States v. McCaleb*, 552 F. 2d 717 (6th Cir. 1977)" (Pet. App. 2a). This statement can only mean that the court of appeals found that the consent was invalidated by what it held to be an illegal detention; there is no suggestion in its opinion that the district court's factual finding was clearly erroneous.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1980

Supreme Court, U. S.

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UNITED STATES OF AMERICA,

Petitioner,

vs.

SYLVIA L. MENDENHALL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS, SIXTH CIRCUIT.

**BRIEF OF AMERICANS FOR EFFECTIVE LAW
ENFORCEMENT, INC., AS AMICUS CURIAE
IN SUPPORT OF THE PETITIONER.**

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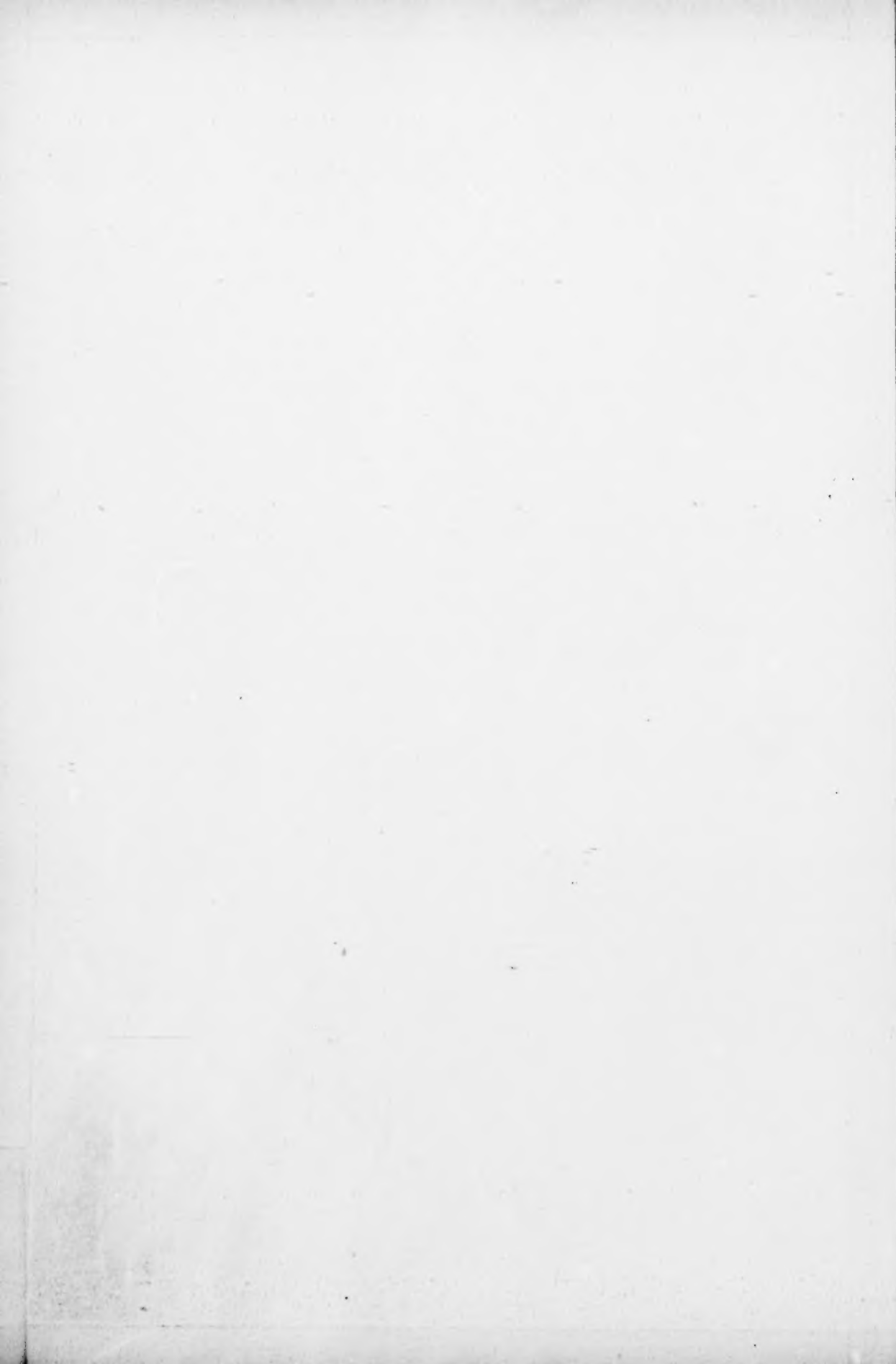


TABLE OF CONTENTS.

	PAGE
Table of Authorities.....	ii
Interest of Amicus Curiae.....	1
Argument	2
I. Introduction	2
II. The Ruling Below Is in Error as It Pertains to the Use of the Drug Courier Profile to Establish Reasonable Suspicion or Probable Cause, and It Seriously Threatens the Use of Profiles in the Hijacker Detection System So Vital to Public Protection	7
III. The Ruling Below Will Also Threaten the Use of Composite Sketches to Establish Reasonable Suspicion or Probable Cause.....	9
Conclusion	11

TABLE OF AUTHORITIES.

Cases.

Commonwealth v. McKenna, 244 N. E. 2d 560 (Mass. 1969)	6
People v. Griffin, 272 N. E. 2d 477 (N. Y. 1971)	6
Reid v. Georgia, No. 79-448 (Ga. Ct. App. 4-4-79), 26 Cr L 4055	3, 4
State v. Ginardi, 268 A. 2d 534 (N. J. App. 1970)	6, 10
Terry v. Ohio, 392 U. S. 1 (1968)	4, 5, 7, 8
United States v. Ballard, 573 F. 2d 913 (5th Cir. 1978) ..	4, 5
United States v. Carrizosa-Gaxiola, 523 F. 2d 239 (9th Cir. 1975)	8
United States v. Davis, 482 F. 2d 893 (9th Cir. 1973) ...	5
United States v. Elmore, 595 F. 2d 1036 (5th Cir. 1979) ..	4, 5
United States v. Epperson, 454 F. 2d 769 (4th Cir. 1972)	5
United States v. Lopez, 328 F. Supp. 1077 (N. Y. 1971) ..	5
United States v. McCaleb, 552 F. 2d 717 (6th Cir. 1977)	3, 4, 5, 7
United States v. Mendenhall, 596 F. 2d 706 (6th Cir. 1979)	3, 4, 5, 7, 10
United States v. Ruiz-Estrella, 481 F. 2d 723 (2nd Cir. 1973)	5

Statutes or Regulations.

37 Fed. Reg. 2500, <i>et seq.</i>	5
---	---

Books.

LaFave, 3 Search and Seizure 332 (1978).....	5
Wall, Eye Witness Identification in Criminal Cases 169-170 (1965).....	9

Articles.

14 ALR Fed. 286, Anti-Hijack Measures-Validity.....	5
42 ALR 3d 1217, Admissibility—Composite Police Sketch	6
20 Am Jur Proof of Facts 539, Eye-Witness Identification	10



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**BRIEF OF AMERICANS FOR EFFECTIVE LAW
ENFORCEMENT, INC., AS AMICUS CURIAE
IN SUPPORT OF THE PETITIONER.**

This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file has been granted by the Solicitor General of the United States, counsel for the Petitioner, and by Kenneth Sasse, Esq., and F. Randall Karfonta, Esq., counsel for the Respondent. Letters of consent of both parties have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws the purposes of the AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and police effectiveness to deal with crime.

Our particular interest in this case arises from the fundamental and far-reaching policy issue involved—the articulation and protection of the legitimate interests of law enforcement agencies in the investigation and prosecution not only of drug traffickers, but of those who pose a threat to the safety of air travelers and also criminal suspects in general who can be identified and apprehended by use of specific suspect profiles and composite sketches. It is our belief that a failure of the Court to reverse the ruling of the Sixth Circuit Court of Appeals will threaten the use of legitimate and necessary law enforcement techniques extending beyond the facts of this case.

ARGUMENT.

I.

Introduction.

This case directly involves three issues that are of grave importance to state and federal law enforcement officers: (1) the propriety under Fourth Amendment principles of the practice of approaching persons and requesting identification on the basis of facts that, in the experience of such officers, as manifested

in a typical suspect "profile", indicate that such persons may be narcotics couriers, but which are also consistent with innocent behavior; (2) whether the actions of the federal narcotics agents in the instant case, in requesting a suspected narcotics courier to move from the public area of an airline terminal to a nearby office for further questioning, resulted in an arrest for Fourth Amendment purposes that would be unconstitutional unless supported by probable cause; and (3) whether a suspect who is illegally detained can validly consent to a search.

We will limit our consideration in this brief to the first issue and to the related questions that can reasonably be expected as progeny of the ruling of the Sixth Circuit Court of Appeals if upheld by this Court. The importance of this particular issue is underscored by the state case of *Reid v. Georgia*, No. 79-448 (Ga. Ct. App. 4-4-79) presently before the Court on a petition for certiorari filed 9-17-79 (26 Cr L 4055) presenting the question: "Does establishment of drug courier profile by law enforcement personnel create 'articulable suspicion' on which law enforcement personnel may intrude upon freedom protected by Fourth Amendment?"

As is our custom when appearing as *amicus curiae* before this Court, we will not reiterate at any length the legal arguments made by the Government in this case, although we are in complete accord with such arguments and wish to associate ourselves with and express our complete support for them. We will, however, as already stated, address ourselves to the important policy questions raised by the first issue in this case, and to their importance to the effectiveness of law enforcement nationwide.

The keystone case on the present issue in the Sixth Circuit Court of Appeals is *United States v. McCaleb*, 552 F. 2d 717 (6th Cir. 1977) in which the court held that the drug courier profile by itself, does not provide probable cause to arrest a suspect. As noted in the dissenting opinion of Circuit Judge Weick in the instant case (596 F. 2d 706, 708), the question not only of probable cause, but perhaps even more importantly that of

reasonable suspicion based upon articulable facts under the common law stop and frisk authority of *Terry v. Ohio*, 392 U. S. 1 (1968), is one of exceptional importance to the federal Government in view of the large quantities of narcotics flowing into airports such as Detroit from other cities around the country. Footnote one in Judge Weick's opinion (596 F. 2d 706, 708) indicates the type and amount of illegal narcotics seized at the Detroit Metropolitan Airport alone. That situation is repeated at many airports around the country as indicated by cases such as *United States v. Ballard*, 573 F. 2d 913 (5th Cir. 1978) and *United States v. Elmore*, 595 F. 2d 1036 (5th Cir. 1979), which also involved the use of drug courier profiles by federal narcotics agents. The state case of *Reid v. Georgia*, *supra*, recently docketed in this Court, indicates that the technique and its legal implications are of importance to state law enforcement personnel as well.

The basic characteristics and operation of the drug courier profile are described in varying degrees of detail in the dissenting opinion in *Mendenhall* in the Sixth Circuit Court of Appeals, and the opinions in *McCaleb*, *Ballard* and *Elmore*, and will not be further described here except to note that the typical characteristics of suspects in such profiles are complex and multitudinous, sometimes involving "primary characteristics" and "secondary characteristics" as described in footnote 3 to the opinion in *Elmore*, *supra* (595 F. 2d 1036, 1039). As can readily be seen, deliberate application of such complex class characteristics requires the skill and concentration of a trained law enforcement officer, and by no means can it be said that such an officer, if properly applying the profile to a given suspect, is acting on a mere "hunch" or "guess". Indeed, such proper application must be conceded to involve the kind of "articulable suspicion" referred to in *Reid v. Georgia*, *supra*, and approved as the basis for the exercise of the Fourth Amendment stop and frisk power of law enforcement officers articulated first in *Terry v. Ohio*, *supra*. It is important to note that con-

struction of the profile is based not upon someone's imagination of what drug couriers must look like and their characteristics, but upon what drug couriers *in fact* look like and their *actual* characteristics, as revealed by the real-life experience of trained law enforcement officers, accumulated over a period of time and memorialized in the drug courier profile. See, *Mendenhall, McCaleb, Ballard and Elmore, supra*.

The use of the drug courier profile is analogous to two other important law enforcement activities that *amicus* wishes to bring to the attention of the Court. The first is the profile that has become a standard part of the total antihijacking procedures implemented by industry and the federal Government to stem the tide of aircraft hijacking and pirating that has resulted in the great loss of lives and destruction of property. See, 37 Fed. Reg. 2500, *et seq.* These procedures involve, in progression: (1) a "profile" that consists of observable characteristics which, based upon the experience of law enforcement officers, distinguishes potential hijackers from the public in general—not unlike the nature and use of the drug courier profile involved in the instant case; (2) electronic weapons detectors (magnetometers); (3) interviews by airline employees or law enforcement officers, similar to the interviews conducted by law enforcement personnel after the drug courier profile has triggered an investigatory stop; or (4) frisks or searches of passengers and/or baggage. See, *LaFave*, 3 Search and Seizure 332 (1978); 14 ALR Fed. 286, Anti-Hijack Measures—Validity.

In the cases that have examined the constitutionality of such procedures, beginning with the use of the profile and a progression to the magnetometer, interview, and weapons frisk, the courts have upheld such techniques generally upon the basis of the Fourth Amendment stop and frisk powers articulated in *Terry v. Ohio, supra*. See, *e.g.*, *United States v. Lopez*, 328 F. Supp. 1077 (N. Y. 1971); *United States v. Ruiz-Estrella*, 481 F. 2d 723 (2nd Cir. 1973); *United States v. Epperson*, 454 F. 2d 769 (4th Cir. 1972); and also, *United States v. Davis*,

482 F. 2d 893 (9th Cir. 1973) (validating such procedures upon authority upholding administrative searches pursuant to a regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation). In these cases the courts have focused upon the governmental interest justifying the intrusion, concluding that the extreme danger of a hijack or destruction of property constitutes an "exigent" circumstance justifying an exception to the general warrant requirement.

The second analogous law enforcement activity is the use of composite drawings or sketches to identify and apprehend an unknown suspect in the commission of a crime. The majority of the cases that have discussed such composite drawings have involved the issue of admissibility of the drawings at trial. Such evidence has usually been excluded as hearsay. See, cases collected at 42 ALR 3d 1217, Admissibility—Composite Police Sketch. However, even though such evidence has generally been denied admissibility at trial, it has been recognized as having validity in the formation of *reasonable suspicion or probable cause* for Fourth Amendment arrest purposes. See, *People v. Griffin*, 272 N. E. 2d 477 (N. Y. 1971); *State v. Ginardi*, 268 A. 2d 534 (N. J. App. 1970) (where a composite was compiled by a standard police device known as an "Identi-Kit" consisting of hundreds of transparent celluloid overlays representing variations of human physiognomy); and *Commonwealth v. McKenna*, 244 N. E. 2d 560 (Mass. 1969). Thus, although the courts are split on the issue of the admissibility of such evidence at trial, usually excluding it on the basis of the hearsay rule, it has been recognized as valid and reliable for Fourth Amendment purposes.

Amicus submits, as demonstrated, *infra*, that both of the foregoing accepted and perfectly proper law enforcement investigative techniques—so absolutely necessary—are threatened by the ruling of the Sixth Circuit Court of Appeals with respect to the use of the drug courier profile for investigatory stops founded on reasonable suspicion or even probable cause to arrest.

II.

The Ruling Below Is in Error as It Pertains to the Use of the Drug Courier Profile to Establish Reasonable Suspicion or Probable Cause, and It Seriously Threatens the Use of Profiles in the Hijacker Detection System So Vital to Public Protection.

The Sixth Circuit Court of Appeals in its *en banc per curiam* opinion reversed the judgment of conviction of the District Court without stating that the District Court's finding of facts on the issue of reasonable grounds to stop and question using the drug courier profile had not been supported by substantial evidence. We submit that this was clearly erroneous, and that the conclusion of law relied upon was incorrect. The court apparently regards *McCaleb* as holding that under no circumstances can the drug courier profile be used to find articulable facts sufficient to give rise to a reasonable suspicion that would permit a *Terry*-type stop and questioning. *McCaleb*, however, does not require such a conclusion. The *McCaleb* opinion states that by itself the drug courier profile does not provide probable cause to arrest an individual. It also states, however, that

In addition, while a set of facts may arise in which the existence of certain profile characteristics constitutes reasonable suspicion, the circumstances of this case do not provide "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant[ed]" the intrusion of an investigatory stop. 552 F. 2d 717, 720 (emphasis added).

The *McCaleb* opinion further stated that the activities of the appellants, in that case as observed by the federal agents, were consistent with innocent behavior.

Can it be realistically said, that the confluence of a large number of drug courier profile characteristics, based upon the experience of trained officers in dozens of cases, based upon

actual cases resulting in convictions, and coming together in one suspect at the same time and place, is "consistent with innocent behavior", such that a *per se* rule is justified for excluding the profile as the basis for reasonable suspicion or probable cause?

It is submitted that the presence of a substantial number of the profile characteristics in one suspect, such as the use of small denomination bills for ticket purchases, travel to and from major drug import centers, staying for short periods of time, the absence of luggage or use of empty suitcases, nervousness, use of an alias, etc., taken together, would lead any reasonable person having special knowledge of the *modus operandi* and characteristics of interstate drug couriers to believe that such a person is a drug courier and *requires* a prudent law enforcement officer to stop and inquire of such person. As the Court in *United States v. Carrizosa-Gaxiola*, 523 F.2d 239, 241 (9th Cir. 1975) stated, "[f]ounded suspicion requires some reasonable ground for singling out the person stopped as one who was involved or is about to be involved in criminal activity." Reasonable men would agree that even though any one, or a few, of these facts and characteristics taken together might be consistent with innocent behavior, the combination of several simply would not be consistent with innocent behavior.

Certainly the courts referred to in Point I, *supra*, that have considered the use of a hijacker profile in finding a sufficient Fourth Amendment basis to stop and inquire, would not have agreed with the rationale of the Sixth Circuit Court of Appeals in refusing to assign a common-sense value to the use of profiles in the reasonable suspicion-probable cause equation. Although in such cases the profile is considered *in combination* with another element of an investigatory nature, namely the activation of a magnetometer, before an inquiry is made, the profile is an essential element of reasonable suspicion sufficient to undertake the sort of limited intrusion into a suspect's privacy sanctioned by *Terry*. Failure to accord approved legal

status to the use of properly constructed and properly administered suspect profiles in drug courier cases will jeopardize the use of similar profiles in hijacker cases and will seriously disrupt the nation's air safety program.

III.

The Ruling Below Will Also Threaten the Use of Composite Sketches to Establish Reasonable Suspicion or Probable Cause.

As noted, *supra*, many courts have recognized the value of composite sketches in the investigation of crime and the apprehension of suspects, regardless of the inadmissibility of such materials at trial under the hearsay rule. One respected commentator noted the effectiveness and utility of such sketches thusly:

The policeman, by means of skillful questioning, and by trial and error, is able to produce a detailed drawing which the witness states is an accurate representation of the face of the perpetrator of the crime. This drawing is then reproduced in large numbers and given to police officers so as to enable them to recognize the suspect, should they happen to see him. Sometimes, where the crime is a very serious one, copies of the drawing are given to the newspapers, which publish them in an effort to alert the public. Often, criminals who might otherwise have gone free are recognized and arrested because of these drawings. Wall, *Eye Witness Identification in Criminal Cases* 169-170 (1965).

One of the most commonly used systems of composite sketches is the so-called "Identi-Kit". It consists of hundreds of celluloid overlays conforming to typical human features such as hairline, nose, eyes, chin contour, mouth, etc. A composite is usually put together by a trained law enforcement officer and it is then frequently circulated to law enforcement personnel in the field who will attempt to compare the composite sketch to persons they observe. If a specific comparison is made, and a

trained law enforcement officer reasonably believes that a person matches the composite, reasonable suspicion to stop and inquire, or even probable cause to arrest, may exist.

In *State v. Ginardi*, 268 A. 2d 534 (N. J. App. 1970) an "Identi-Kit" was used to prepare a composite sketch of a suspect and the defendant's arrest was made on the basis of a "striking likeness" of the defendant to the drawing, without any other suspicious circumstances being present. The Court stated:

It is clear from the record that the Hamilton police had probable cause to believe that defendant was the man who had attacked Elaine and Susan and were justified in arresting and detaining him. 273 A. 2d 534, 541-542.

Amicus respectfully re-submits that a legitimate law enforcement investigatory tool is threatened by the ruling of the Sixth Circuit Court of Appeals in this case. The similarities between the use of profiles and composite sketches—the attempt to isolate and identify suspects by the use of common characteristics—require a holding by this Court that if the latter may be used for Fourth Amendment purposes, so may the former. Indeed many police departments have carried the use of composite sketches produced by the "Identi-Kit" method one step further by coupling the Kit with *modus operandi* files in a system called "IDMO" to produce mug shots of potential suspects. See 20 Am Jur Proof of Facts 539, Eye-Witness Identification, Section 13. All such legitimate investigatory techniques are threatened by the holding of the court below. Law enforcement agencies, state and federal, will not be able to identify and apprehend suspects in thousands of cases where investigatory stops founded on reasonable suspicion, and arrests founded on probable cause are presently recognized by the courts. *Amicus* submits that the Fourth Amendment does not require so devastating a result.

CONCLUSION.

The decision of the Sixth Circuit Court of Appeals in this case should be reversed as it pertains to the issue of the use of the drug courier profile as a basis for reasonable suspicion and probable cause, because it is unwarranted under any reasonable application of Fourth Amendment principles.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 78-1821

UNITED STATES OF AMERICA,
Petitioner,

v.

SYLVIA L. MENDENHALL,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

**BRIEF OF NATIONAL LEGAL AID AND DEFENDER
ASSOCIATION, AS AMICUS CURIAE
IN SUPPORT OF THE RESPONDENT**

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INDEX

	Page
INTEREST OF THE AMICUS CURIAE	2
ARGUMENT	3
I. The Factors Selected by DEA Disproportionately Burden Poor And Hispanic People	4
Who Is "Profiled"	5
Discriminatory Results	5
Statistics Offered By The Government	6
Additional Statistics And An Interpretation ...	8
The Results Of The "Profile" Balanced Against The Constitutional Intrusion On Poor And Hispanic Persons	12
II. Drug Courier "Profiles" Are Unlike Both Anti-Hijacking And Composite Sketch Techniques ..	13
A Comparison With Anti-Hijacking Techniques	13
A Comparison With Composite Sketch Techniques	16
III. Border Searches Are Unlike Interstate Searches	16
CONCLUSION	17
APPENDIX	1a

CITATIONS

CASES:

Boyd v. United States, 116 U.S. 616 (1886)	16-17
Brown v. Texas, 99 S. Ct. 1637 (1979)	12
Delaware v. Prouse, 99 S. Ct. 1391 (1979)	6
Galvan v. Press, 347 U.S. 522 (1954)	17
People v. Hyde, 12 Cal. 3d 158, 524 P. 2d 830 (1974) ..	14

	Page
Terry v. Ohio, 392 U.S. 1 (1968)	8
United States v. Albarado, 495 F.2d 799 (2d Cir. 1974) ..	14
United States v. Ballard, 573 F.2d 913 (5th Cir. 1978) ..	5
United States v. Chambers, 425 F. Supp. 1330 (E.D. Mich. 1977)	3
United States v. Elmore, 595 F.2d 1036 (5th Cir. 1979)	5
United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977) ..	5
United States v. Moreno, 475 F.2d 44 (5th Cir.), <i>cert. denied</i> , 414 U.S. 840 (1973)	15
United States v. Price, 599 F.2d 494 (2d Cir. 1979) ..	5
United States v. Rico, 594 F.2d 320 (2d Cir. 1979)	4, 6
United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973)	14
United States v. Smith, 574 F.2d 882 (6th Cir. 1978) ..	5
United States v. Van Lewis, 409 F. Supp. 535 (E.D. Mich. 1976)	4, 7, 15
United States v. Westerbann-Martinez, 435 F. Supp. 690 (E.D.N.Y. 1977)	5, 6
Worthy v. United States, 328 F.2d 386 (5th Cir. 1964) ..	17

STATUTES AND REGULATIONS:

Act of July 31, 1789, Ch. 5, § 24, 1 Stat. 43	16
14 C.F.R. § 121.538 (1973)	13
8 U.S.C. § 1357 (1970)	16

CONGRESSIONAL HEARINGS:

- "FBI Statutory Charter," Hearings Before the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. (Part 1 1978) 11
- "Federal Drug Enforcement," Hearings Before the Permanent Subcomm. on Government Operations, 94th Cong., 2d Sess. (1976)
- Part 4 4
- Part 5 9, 10, 11
- "The Global Connection: Heroin Entrepreneurs," Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. (1976) 8-9, 10
- "IRS: Taxing the Heroin Barons," Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. (Vol. II 1976) 11
- "Oversight Hearings on Narcotics Abuse and Current Federal and International Narcotics Control Effort," Hearings Before the Select House Comm. on Narcotics Abuse and Control, 94th Cong., 2d Sess. (1976) 10

ARTICLES:

- Comment, "Minority Groups and the Fourth Amendment Standard of Certitude: *United States v. Ortiz* and *United States v. Brignoni-Ponce*," 11 Harv. C.L.-C.R. L. Rev. 733 (1976) 6
- Note, "The Airport Search and the Fourth Amendment: Reconciling the Theories and Practices," 7 U.C.L.A.-Alas. L. Rev. 307 (1978) 13, 14
- Note, "The Constitutionality of Airport Searches," 72 Mich. L. Rev. 128 (1973) 17



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**BRIEF OF NATIONAL LEGAL AID AND DEFENDER
ASSOCIATION, AS AMICUS CURIAE
IN SUPPORT OF THE RESPONDENT**

This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file has been granted by the Solicitor General of the United States, counsel for the Petitioner, and by Kenneth Sasse, Esq. and F. Randall Karfonta, Esq., counsel for the Respondent. Letters of consent of both parties have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The National Legal Aid and Defender Association (NLADA) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to the poor. Its members include the great majority of defender offices, coordinated assigned counsel systems and legal aid societies in the United States. The membership of NLADA also includes two thousand individual members, most of whom are private practitioners.

In its attempt to provide effective legal services to the poor, NLADA necessarily must defend against governmental attempts to limit the reach of constitutional protections. We say "necessarily" because it is always the poor who are most immediately affected by such incursions and who are least able to defend against them. Parenthetically this very case well supports this point.

It is our particular concern in this case to point out the actual effect the government's position would have on poor people, particularly Black and Hispanic poor people, as well as to refute the argument that this Court's failure to formally approve the use of drug profiles will "threaten the use of legitimate and necessary law enforcement techniques extending beyond the facts of this case." Brief of Americans for Effective Law Enforcement, Inc. as Amicus Curiae at 2 (hereinafter "AELE Brief"). Although we concur in and wholeheartedly support the legal arguments set forth in Respondent's Brief, we will not restate them here. Instead, we will specifically address ourselves to the policies underlying continued judicial adherence to the teachings of the Fourth Amendment.

ARGUMENT

I. The Factors Selected By DEA Disproportionately Burden Poor And Hispanic People

Amicus would first reiterate that, as the government concedes in its Brief at 31-32 & n. 23, there is no "drug courier profile." As the court noted in *United States v. Chambers*, 425 F.Supp. 1330, 1333 (E.D.Mich. 1977):

One problem with determining the propriety of the stop solely on the basis of whether or not the defendant met the profile is that the factors present in the profile seem to vary from case to case. Special Agent Wankel himself testified that the profile in a particular case consists of anything that arouses his suspicions. A look at the profile cases themselves tends to show that the factors present in the profile tend to change.

Further support for this position comes directly from Customs Inspector Thomas Lepert, who said, when asked by National Public Radio how he knew which persons to stop for narcotics smuggling:

There are so many profiles as to what makes a smuggler and actually none of them hold any validity because the smugglers try very hard not to fall into any profile. . . . If you feel that there's something about this guy—he is betraying nervousness or he shows anxiety over the fact that you know he is just jittery or whatever—these are little signals to you that maybe you wouldn't be able to define in terms afterwards if somebody said, "Well, why did you go after this guy?" You know, the overall thing is *I had an impression that maybe he had narcotics*. [Emphasis added].¹

¹ A transcription of the entire interview which was aired on National Public Radio on November 20, 1979 is attached hereto as Appendix, 1a. A tape recording of the interview supplied by National Public Radio has been filed with the Court.

In light of the fact that the "experience" of the DEA agents so heavily relied upon by the government, (*see, e.g.*, Gov. Brief at 31-33, 35), comes from work with Customs,² it is most revealing that Customs itself works largely on hunches and guesses. And further one wonders where DEA Task Force agents obtain their training and experience, when those agents are often local police officers who have been promoted to new spots created by increased LEAA funding. *See generally* "Federal Drug Enforcement," Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations, 94th Cong., 2d Sess. 929, 998-1006 (Part 4 1976) (Report of the Comptroller General of the United States, "Federal Drug Enforcement: Strong Guidance Needed" [December, 1975]).

Who Is "Profiled"

What we have then, is the reliance of agents on pre-determined factors that continually change. Or, as the government says at 32 of its Brief, the profile "is constantly modified in light of experience." Which means that every time a new "suspect" is caught with narcotics, his or her eccentricities are added to the profile. What's more, some of the profile characteristics are kept "secret." *See United States v. Van Lewis*, 409 F.Supp. 535, 538 (E.D.Mich. 1976).

The result is that agents are predisposed to search a selected group of people who:

- a. travel with "insufficient" luggage,

² *See, e.g.*, *United States v. Rico*, 594 F.2d 320, 321 (2d Cir. 1979).

- b. dress differently than the majority of air travelers,
- c. pay for their tickets in small denomination currency,
- d. appear nervous,
- e. use public transportation in departing the airport, and
- f. are of Hispanic (especially Mexican) descent.^a

In other words, people who:

- a. cannot afford much luggage;
- b. do not dress neatly and tastefully;
- c. do not have checking accounts;
- d. do not carry large sums of money;
- e. are uncomfortable in unfamiliar environments (airports);
- f. do not have friends who are able to leave home or work to pick them up (or perhaps do not have friends who can afford the cost of gasoline); and
- g. are Hispanic.

Discriminatory Results

It is clear that all these characteristics apply first and foremost to poor people, especially poor Hispanic

^a See, e.g., *United States v. Price*, 599 F.2d 494, 500 (2d Cir. 1979); *United States v. Elmore*, 595 F.2d 1036, 1039 & n. 3 (5th Cir. 1979); *United States v. Smith*, 574 F.2d 882 (6th Cir. 1978); *United States v. Ballard*, 573 F.2d 913, 914 (5th Cir. 1978); *United States v. McCaleb*, 552 F.2d 717, 719-20 (6th Cir. 1977); *United States v. Westerbann-Martinez*, 435 F.Supp. 690, 692-93 (E.D.N.Y. 1977).

people who traditionally fear law enforcement agents and who may not even speak English.⁴ Here, further enhancing the innate fear of the poor and powerless of police generally is the fact that the agents seem to “appear” out of nowhere, not in uniform, flashing badges, asking questions (in English) and taking “suspects” into private rooms. Certainly this approach greatly enhances the fear and anxiety to which this Court referred in *Delaware v. Prouse*, 99 S.Ct. 1391, 1398 (1979). Such “secret police” type tactics, far from furthering a significant national interest instead engender greater fear and anger toward police, contrary to the uncontroverted national interest in developing positive attitudes toward law enforcement personnel. This is especially true, of course, where innocent people are seized.

It thus becomes important to determine how many innocent persons are being subjected to intrusions based on the “profile” because, to the extent these persons constitute an insular and discrete minority, such intrusions may violate their constitutional right to equal protection of the law. *See generally*, Comment, “Minority Groups and the Fourth Amendment Standard of Certitude: *United States v. Ortiz* and *United States v. Brignoni-Ponce*,” 11 Harv. C. R.-C. L. L. Rev. 733, 755-57 (1976).

Statistics Offered By The Government

The government notes that no comprehensive statistics have been kept on the success or failure of the drug profile in detecting drug couriers. Gov. Brief at

⁴ *See e.g.*, *United States v. Rico*, 594 F.2d 3201 (2d Cir. 1979); *United States v. Westerbann-Martinez*, 435 F.Supp. 690 (E.D.N.Y. 1977).

32 & n. 24. Nor are the statistics cited in Judge Weick's dissent below (Pet. App. 4(a) n.1) of any help because they do not show how many of the seizures were made by Customs, how many were made pursuant to a drug courier profile alone or the estimated amount of each drug that passes through the airport undetected.

The only other statistics relied upon by the government are those mentioned in *United States v. Van Lewis*, 409 F.Supp. 535, 539 (E.D.Mich. 1976). There it was revealed that statistics are not kept as to the number of persons searched—only statistics as to the number of “search encounters” are kept and “search encounters” may include any number of people. Nonetheless, of particular significance for the purposes of this case, the court in *Van Lewis* found that no contraband was uncovered in “15 to 25” of the 26 cases in which consent to search was given. The total number of searches appears to have numbered 141. Of these, 77 searches appear to have disclosed contraband. Amicus uses the word “appears” because the figures are not clear. (Note, for example, that the 26 consent searches and the 43 non-consent searches do not equal either the 77 searches in which contraband was discovered or the 141 persons searched.)

At best, these statistics do reveal that a fairly high number of innocent persons are searched, based at least in part on the drug courier profile. We can only guess at the numbers in other airports since they are completely unrecorded. What they do not reveal, but what is clear from an analysis of the “confluence of factors,” is the adverse effect the use of the factors has on the poor and particularly on the poor who are also members of a particular minority group. Because of this effect and the equal protection problems inherent therein,

Amicus respectfully submits that airport searches based on factors which inevitably focus on members of a minority must be carefully scrutinized to determine whether the results of the searches are significant enough to warrant the infringement.

Additional Statistics And An Interpretation

It is noted in the AELE Brief at 3-4 that the question of "reasonable suspicion based upon articulable facts under the common law stop and frisk authority of *Terry v. Ohio*, 392 U.S. 1 (1968), is one of exceptional importance to the Federal Government in view of the large quantities of narcotics flowing into airports such as Detroit from other cities around the country." The empirical data cited in support of this statement is scant. (Parenthetically, this statement misses the point that *Terry* created a limited exception to ensure the safety of the police.) Indeed, the only data anywhere cited by the AELE or the government lists the type and amount of narcotics seized at Detroit Metropolitan Airport.

The deficiencies of these statistics were noted by Amicus *supra* at 6. Amicus will therefore attempt to remedy some of those deficiencies here.

Approximately 6,600 pounds of illicit heroin were smuggled into the United States in 1970 compared with over 100,000,000 tons of legal goods imported that year. Customs seized under five percent of the heroin in what was, for them, a better than average year. Further, the United States heroin market can be completely satisfied with between four-five tons of heroin per year.⁵

⁵ "The Global Connection: Heroin Entrepreneurs," Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the

Consider also:

The Consumers Union estimates that if Customs seizures quadrupled, the effect would only represent an increase in price of two cents per five dollar street bag. Thus, a substantial increase in the effectiveness of anti-smuggling enforcement would not result in eliminating narcotics traffic but, rather, would only serve to increase street prices (or increase adulteration). Raising the U. S. market price for heroin might also divert heroin now distributed in Europe to a more profitable U. S. market.

Id. at 741 (footnotes omitted).

The few statistics cited by the government must be read in light of the following:

1. "By now, any professional law enforcement officers, . . . and most of the more astute reporters among our news media have learned that reporting of large weights of heroin seized is meaningless without an indication of the purity of the drug. We all know that such seizures, alone, are of little significance as to the impact made on source channels from which the drug originates."⁶

2. In contrast to public statements made by DEA officials in 1976 to the effect that Class I heroin arrests

Senate Comm. on the Judiciary, 94th Cong., 2d Sess. 741 (1976) (Israel & Denardis, "The Irrationality of a Law Enforcement Approach to Narcotics," 50 J. Urban L. 631 [1973]) (hereinafter "Global Connection Hearings").

⁶ "Federal Drug Enforcement," Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations, 94th Cong., 2d Sess. 1297 (Part 5 1976) (Statement of Martin F. Pera, Former Chief of Domestic Investigations, Office of Enforcement, DEA) (hereinafter "Federal Drug Enforcement Hearings").

increased 106% over a nine month period, DEA's Program Performance Measurement Publication for the third quarter of fiscal year 1976 stated:

National price and purity data for the third quarter, fiscal year 1976 indicate an increase in heroin availability which signifies a definite trend. Heroin retail purity, currently at 6.64% at the national level, is at the highest recorded point since 1971.

* * * * *

During this quarter, there was a reported increase in availability in all areas except the Southern and Western states.

Federal Drug Enforcement Hearings at 1299.

Thus, query whether the effectiveness of DEA enforcement programs may be determined based on its arrest and seizure statistics as the government apparently is asking this Court to do here.

3. Every reported hearing, journal or statistical study by or about DEA notes that an effective drug interdiction program must consist of (a) stopping the importation of illegal drugs, preferably in the countries where they originate⁷ and (b) arresting the high level

⁷ See, e.g., "Oversight Hearings on Narcotics Abuse and Current Federal and International Narcotics Control Effort," Hearings Before the Select House Comm. on Narcotics Abuse and Control, 94th Cong., 2d Sess. 373-380 (1976) (Statement of Hon. Charles W. Robinson, Deputy Secretary of State) (E.g., "The principal challenge today is about the same as it was 5 years ago: the flow of heroin into our country. In fact, that is the principal problem and we are attacking it, making this our primary target for attack." *Id.* at 374); Global Connection Hearings at 556 (Report to the Congress, Efforts to Stop Narcotics and Dangerous Drugs coming from and through Mexico and Central America by the Comptroller General of the United States: As of October, 1974, 70% of all heroin reaching the United States came from Mexico).

drug smugglers (Class I and Class II violators), and cutting back on street level arrests.⁸

Taken together, the above statements and empirical data make clear that airport stops of suspected drug couriers or "mules" coming from other cities *in this country* are not a high priority of the government and do not significantly affect the flow of narcotics in this country.

Even more telling is the fact that to the best of our knowledge, in all the thousands of pages of hearings on drug enforcement, the use of the drug courier profile as a significant interdiction tool is never discussed. Further, the "DEA Domestic Operations Guidelines" promulgated in December of 1976⁹ nowhere even mention the word "profile," much less delineate guidelines for its use.

⁸ See, e.g., "IRS: Taxing the Heroin Barons," Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. Vol. II 113 (1976) (Statement of Richard L. Thornburgh, then Assistant Attorney General, Criminal Division, Department of Justice) ("On the investigative side, we can only applaud DEA Administrator Peter Bensinger's promise that DEA efforts 'will not be on the street dealer, but on the financier, importer, the criminal organization leader or leaders' and to this end we are devoting substantial prosecutive resources ourselves. . . ."); Federal Drug Enforcement Hearings (Part 5) at 1321 (Joint Statement of James M. Cannon, Assistant to the President for Domestic Affairs and Executive Director, Domestic Council and James T. Lynn, Director, Office of Management and Budget) ("The first major theme is that there should be more selectivity and targeting of Federal law enforcement efforts, these efforts should focus on the arrest of leaders of high-level trafficking networks, and should move away from 'street-level' activities.").

⁹ The Guidelines may be found in "FBI Statutory Charter," Hearings Before the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 163-78 (Part 1 1978).

The only conclusions to be drawn from this pervasive silence (and from the vague and conflicting discussion of drug "profiles" in the case law) are that (a) there is no structured profile; (b) its use is not monitored or regulated (recall no comprehensive statistics have been kept on it nor are there any regulations on it); and (c) it is not important to or successful in interdicting narcotics.

The Results of the "Profile" Balanced Against the Constitutional Intrusion on Poor and Hispanic Persons

The above factors must be balanced against the effect of the profile. It is respectfully submitted that the use of the profile alone as a determinant for stopping persons (and almost universally strip searching them thereafter regardless of their initial responses) results in large scale invasions of the rights of poor and Hispanic people to be free from unreasonable searches and seizures. Clearly, the balance here is heavily weighted in favor of the constitutional rights of innocent poor and Hispanic people. Any other result would signal the beginning of a random stop system in this country, much like that in *Brown v. Texas*, 99 S.Ct. 1637 (1979), for, as a practical matter, there is little difference between a regime that will arrest you for your refusal to answer questions (*Brown v. Texas*) and one that uses your refusal to answer questions as grounds for a body search.

II. Drug Courier "Profiles" Are Unlike Both Anti-Hijacking And Composite Sketch Techniques

A Comparison With Anti-Hijacking Techniques

AELE asserts in its Brief at 5-9 that the drug courier profile is analogous to the anti-hijacking profile. Amicus would respectfully suggest to this Court the many and significant differences between the two. (Amicus will not here discuss the possible objections to the anti-hijacking procedures).

1. The initial anti-hijacking system described in the AELE Brief at 5 which began with a profile and proceeded to a magnetometer to an interview to a search is no longer used because it proved to be ineffective.¹⁰ Thus, in 1973 the FAA ordered all airlines to institute routine searches of all carryon items and magnetometer screenings of all passengers. The Airport Search at 308.

2. These screenings are highly regulated by the FAA. See 14 C.F.R. § 121.538 (1973). Compare this to the complete lack of regulation or compilation of data in the drug profile cases.

3. Weapons searches are conducted in front of the public and are thus under constant scrutiny. Compare this to the persons who are questioned outside the public view and searched behind closed doors. In this regard, note that nowhere has the government cited to the alleged airport regulation which requires private searches.

¹⁰ Only 6% of all persons ultimately frisked under this system were carrying weapons. Note, "The Airport Search and the Fourth Amendment: Reconciling the Theories and Practices," 7 U.C.L.A. Alas. L. Rev. 307, 308 n.9 (1978) (hereinafter "The Airport Search").

4. Airline representatives are always present at weapons searches and they have "a substantial interest in assuring that their passengers are not needlessly harassed." The Airport Search at 313. *See also United States v. Skipwith*, 482 F.2d 1272, 1276 (5th Cir. 1973). Again, drug searches are always conducted in private.

5. Because all persons are subjected to airline weapon searches, there is no discretion involved. Thus, there is no social stigma associated with the searches. The Airport Search at 314. *See also United States v. Skipwith*, *supra* at 1275; *United States v. Albarado*, 495 F.2d 799, 806 (2d Cir. 1974); *People v. Hyde*, 12 Cal. 3d 158, 177, 524 P.2d 830, 843 (1974) (concurring opinion). Compare this with selective searches of poor, Hispanic—often innocent—persons who have no idea why they are being stopped or who is stopping them.

6. All passengers are given advance notice of weapons searches and have the option of avoiding them. Obviously no one has advance notice of a narcotics search.

7. Weapons searches are much less intrusive than the drug profile searches. Once a person stopped for drugs gives any answer the DEA agent "feels" is suspicious, that person is strip searched whereas no one is even frisked for weapons until they have gone through the magnetometer twice. The Airport Search at 308-09.

8. The governmental interest—*i.e.* the saving of lives of passengers and crew as well as airline property—is compelling. The Fifth Circuit has said that "the crime of air piracy exceeds all others in terms of the potential for great and immediate harm to

others." *United States v. Moreno*, 475 F.2d 44, 48 (5th Cir.), *cert. denied*, 414 U.S. 840 (1973). That potential is simply not the same where the persons to be caught are small scale "mules" for a much larger narcotics operation which will undoubtedly go on without them.

As stated by the court in *United States v. Van Lewis*, 409 F.Supp. 535, 542 (E.D.Mich. 1976) :

Although the problems caused by illegal drug traffic in the metropolitan areas of the country are serious indeed, they are quite different from the problems posed by the threat of air piracy when both are viewed within the framework of the Fourth Amendment. The would-be air pirate, by obstructing the right to travel and endangering life in wholesale fashion, threatens the fabric of the republic and strikes at the very heart of our legal and moral relationships with one another.

* * *

As damnable as drug traffic is, its regulation involves the protection of no special public interests like those at play in airport security. Regulation of drug traffic is achieved through enforcement of laws adopted by Congress which are similar to laws prohibiting bank robbery, bribery, or conspiracy. Thus, the court perceives no fundamental public interest at stake in routine enforcement of the drug laws which calls for the development of rules unique to airport drug searches. Accordingly, the government's rights in these cases must be tested against basic Fourth Amendment principles rather than by rules derived from an air piracy context.

Amicus therefore respectfully submits that this Court's decision regarding the legitimacy and/or use of drug courier profiles will have no effect on anti-hijacking techniques.

A Comparison With Composite Sketch Techniques

Amicus would also briefly note that a drug courier "profile," admittedly only loosely based on differing characteristics observed by different people and always changing, is nothing like a composite sketch of a person suspected of a crime. First, in the sketch situation police know a crime has been committed whereas no known crime has been committed at the time the drug profile is used. Second, the sketch is drawn from a description given by a person who has seen the offender and it is intended to depict only one person. Third, the composite sketch may be later viewed by others to determine if a particular stop was reasonable, making the users of it more careful. The drug profile has no such built in safeguards. Again, Amicus submits that these differences set the composite sketch technique completely apart from the so-called drug courier profile and that this Court's decision regarding drug profiles will have no effect on the composite sketch technique.

III. Border Searches Are Unlike Interstate Searches

The government, at page 34 of its Brief, indicates that the use of "profiles" has been approved in other contexts, particularly as an aid to United States Customs Service. Warrantless border searches, however, for which customs officers are uniquely responsible, are not an *exception* to the Fourth Amendment warrant requirement; instead such searches have never been subject to Fourth Amendment limitations. Since 1789, customs officers have been authorized by statute to search anyone entering the United States without a warrant or determination of probable cause.¹¹ In *Boyd*

¹¹ Act of July 31, 1789, ch. 5, § 24, 1 Stat. 43. Currently, see 8 U.S.C. § 1357(c) (1970).

v. *United States*, 116 U.S. 616, 623 (1886), this Court reasoned that, since the statute was passed by the same Congress that proposed the Bill of Rights for ratification by the states, border searches were never intended to fall within the proscriptions of the Fourth Amendment. *See generally* Note, "The Constitutionality of Airport Searches," 72 Mich. L. Rev. 128, 138-41 (1973).

Moreover, the Constitution restricts the government's authority to limit *interstate* travel, a limitation clearly ignored in the drug profile stop situation; whereas it explicitly permits extensive regulation of travel into or out of the country. *See Galvan v. Press*, 347 U.S. 522, 530 (1954); *Worthy v. United States*, 328 F.2d 386, 393 (5th Cir. 1964). Thus the entire history of this country supports the authority of customs officers to stop and search for almost any reason while, contrariwise, it negates any recognized authority for such searches away from the borders.

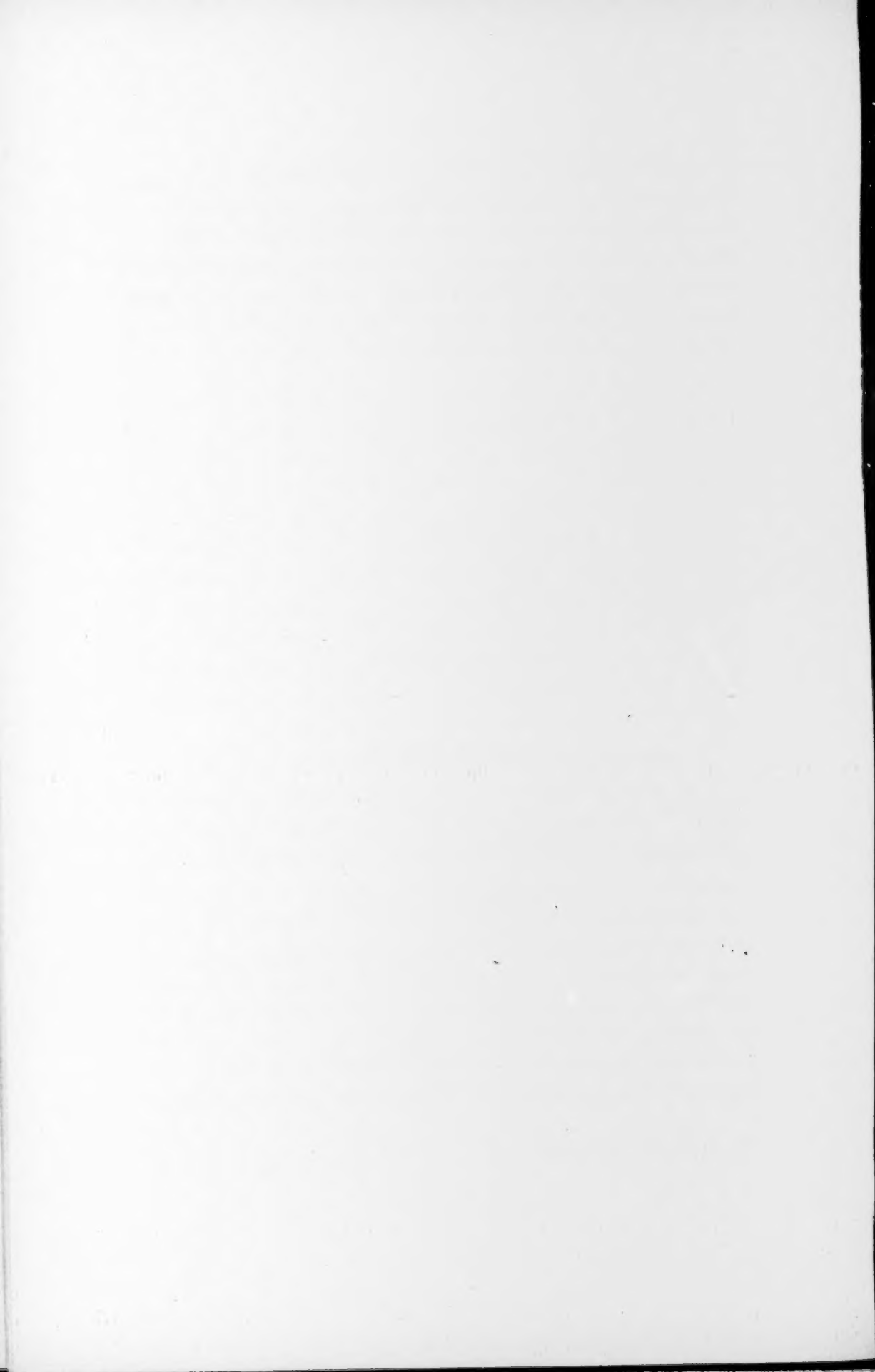
CONCLUSION

For all the above reasons as well as the reasons set forth in Respondent's Brief, we respectfully request this Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

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December 19, 1979





APPENDIX

**Transcription of National Public Radio Interview With
Customs Inspector Thomas Lepert
November 20, 1979**

We won't go too far with this play on words, but "EUREKA" is usually followed by the phrase, "I found it". How do authorities find the huge quantities of illegal drugs and other contraband which come into the United States each day? A lot of drug traffic occurs at airports where customs agents are on duty. At New York's Kennedy International, reporter Warren Kosak spoke with officer Tom Lepert and asked him how he recognizes smugglers.

There are so many profiles as to what makes a smuggler and actually none of them hold any validity because the smugglers try very hard not to fall into any particular profile. So again, the inspector has to use his own imagination, to his own intuitiveness and to try and make a valid determination as to whether or not a person is carrying narcotics is very, very difficult. It's strange, but things run in patterns you know. You'll go for years and years and years and they will all be body carries. Everybody will have a vest or girdle on, within the crotch area, up and down their back, taped very close to the contours of their body will be cocaine. On a number of cases you find this—right. And it seems to be the mode or the profile for that particular period of time. And then suddenly you'll find nobody carries, everything comes in false-sided suitcases.

The first thing you want to determine is what countries has the person travelled in. If you get an individual who says he was in Nepal for three weeks. And you said what were you doing there? And he says—"I was meditating," this is kind of an odd situation here because not too many tourists go to Nepal to meditate. And especially if you think the guy is coming from an environment in Nepal where he might have been using drugs. And so you would

watch his body contours—you would definitely look at his major suitcase instead of just his hand luggage, determine whether or not in fact he did have a false bottom. And sometimes, you will look into the suitcase you will find drug regalia. You will find a water pipe or a hash pipe or something like that and as you question the person a little carefully, you notice them for signs of nervousness—whatever the case may be and always being very observant to the reaction. I mean, you are looking at this person while you are speaking to him. You are making a judgment decision, a determination—how far do you want to go with this person. And if you have reason to suspect while you are talking to him he is only a number of feet away from you—maybe 2 feet—you are very close to him you are also watching him the way he is dressed, the way he is responding to you, replying to your questions. And if you feel that there is something about this guy—he is betraying nervousness or he shows anxiety over the fact that—you know he is just jittery or whatever—these are little signals to you that you maybe you wouldn't be able to define in terms of afterwards if somebody said, "Well, why did you go after this guy?" You know the overall thing is I had an impression that maybe he had narcotics.



FILED

DEC 20 1979

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1821

UNITED STATES OF AMERICA,

Petitioner,

—vs.—

SYLVIA L. MENDENHALL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

**BRIEF FOR THE AMERICAN CIVIL LIBERTIES
UNION, AMICUS CURIAE**

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Interest of <u>Amicus Curiae</u>	1
Statement of the Case	3
Introduction and Summary of Argument	4
Argument	8
I. THE INVESTIGATORY STOPPING AND QUES- TIONING OF RESPONDENT WAS A SEIZURE REQUIRING REASONABLE SUSPICION UNDER THE FOURTH AMENDMENT	8
II. THE SEIZURE OF RESPONDENT WAS UNCON- STITUTIONAL BECAUSE IT WAS NOT BASED ON A REASONABLE SUSPICION THAT SHE WAS INVOLVED IN CRIMINAL ACTIVITY	21
III. RESPONDENT'S ALLEGED CONSENT TO A STRIP SEARCH WAS NOT VOLUNTARY, AND WAS INVALID AS A "FRUIT" OF AN IL- LEGAL DETENTION. ACCORDINGLY, EVI- DENCE OBTAINED IN A SEARCH IMMEDI- ATELY FOLLOWING UPON HER ILLEGAL INVESTIGATORY STOP MUST BE SUPPRESSED	52
CONCLUSION	61

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
Adams v. Williams, 407 U.S. 143 (1972)	14
Amos v. United States, 255 U.S. 313 (1921)	53
Brown v. Illinois, 422 U.S. 590 (1975)	52, 59, 60
Brown v. Texas, 61 L.Ed.2d 357 (1979)	passim
Bumper v. North Carolina, 391 U.S. 543 (1968)	54, 56
Camara v. Municipal Court, 387 U.S. 523 (1967)	45, 46
Delaware v. Prouse, 59 L.Ed.2d 660 (1979)	passim
Dunaway v. New York, 60 L.Ed.2d 824 (1979)	52, 60
Johnson v. United States, 333 U.S. 10 (1948)	53, 54
Marshall v. Barlow's, Inc., 436 U.S. 307 (1968)	46
Miranda v. Anzana, 384 U.S. 436 (1966)	58, 60
Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)	47

Page

Schneckloth v. Bustamonte, 412 U.S. 218 (1973)	7, 52, 55, 57, 58
Sibron v. New York, 392 U.S. 40 (1968)	passim
State v. Ochoa, 112 Ariz. 582, 544 P.2d 1097 (1976)	45
Terry v. Ohio, 392 U.S. 1 (1967)	passim
Torres v. Puerto Rico, 47 U.S.L.W. 4716 (June 18, 1979)	2, 28
United States v. Allen, 421 F. Supp 1372 (E.D.Mich. 1976)	19, 41
United States v. Andrews, 600 F.2d 563 (6th Cir. 1979)	19, 28, 30, 37
United States v. Ballard, 573 F.2d 913 (5th Cir. 1978)	19
United States v. Bell, 464 F.2d 667 (2nd Cir. 1972)	40
United States v. Brignoni-Ponce, 422 U.S. 873 (1975)	9, 29, 46, 48
United States v. Canales, 572 F.2d 1182 (6th Cir. 1978)	19, 44, 50, 51
United States v. Chamblis, 425 F. Supp. 1330 (E.D.Mich. (1977)	19, 33, 41, 42
United States v. Craemer, 555 F.2d 594 (6th Cir. 1977)	41, 44

	<u>Page</u>
United States v. Elmire, 595 F.2d 1036 (5th Cir. 1979)	19
United States v. Escamilla, 560 F.2d 1229 (5th Cir. 1977)	37
United States v. Floyd, 418 F. Supp. 724 (E.D. Mich. 1976)	19, 33, 41
United States v. Himmelwright, 551 F.2d 991 (5th Cir. 1977)	37
United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971)	40, 45, 46
United States v. Martinez-Fuerte, 428 U.S. 543 (1976)	46, 48, 51
United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977)	passim
United States v. McClain, 452 F. Supp. 195 (E.D.Mich. 1977)	19, 37
United States v. Oates, 560 F.2d 45 (2d Cir. 1977)	19, 44, 50
United States v. Pope, 561 F.2d 663 (6th Cir. 1977)	19, 41
United States v. Price, 599 F.2d 494 (2d Cir. 1979)	19
United States v. Rico, 594 F.2d 320 (2d Cir. 1979)	19
United States v. Rogers, 436 F. Supp. 1 (E.D.Mich. 1976)	19

	<u>Page</u>
United States v. Roundtree, 596 F.2d 672 (5th Cir. 1979)	19
United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972).	40
United States v. Smith, 574 F.2d 882 (6th Cir. 1979).	19
United States v. United States District Court, 407 U.S. 297 (1972)	46
United States v. Van Lewis, 409 F. Supp. 535 (E.D.Mich. 1976)	19, 41, 42, 43
United States v. Vasquez-Santiago, 602 F.2d (2d Cir. 1979)	19
United States v. Watson, 423 U.S. 411 (1976)	51, 57
United States v. Westerbann- Martinez, 435 F. Supp. 690 (E.D. N.Y. 1977)	passim
Wong Sun v. United States, 371 U.S. 471 (1963)	58
Ybana v. Illinois, 48 U.S.L.W. 4023 (November 28, 1979)	4, 6, 28

United States Constitution:

Fourth Amendment	passim
----------------------------	--------

<u>Other Authorities:</u>	<u>Page</u>
Amsterdam, "Perspectives on the Fourth Amendment," 58 Minn.L. Rev. 349 (1974)	48
LaFave, Search and Seizure, A Treatise on the Fourth Amendment (1978)	16, 17
LaFave, "Street Encounters and the Constitution: <u>Terry</u> , <u>Sibron</u> , <u>Peters</u> , and Beyond," 67 Mich.L.Rev. 39 (1968)	34
Model Code of Pre-Arraignment Procedure (Proposed Official Draft) (1975)	15
"North American Official Airline Guide," issue of February, 1, 1976	31, 32, 33
Reich, "Police Questioning of Law Abiding Citizens," 75 Yale L.J. 1161 (1966)	16, 17
Tribe, "Trial by Mathematics: Precision and Process," 84 Harv. L.Rev. 1379 (1971)	47, 48

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 78-1821

UNITED STATES OF AMERICA,
Petitioner,

-v.-

SYLVIA L. MENDENHALL,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit

BRIEF FOR THE AMERICAN CIVIL LIBERTIES
UNION, AMICUS CURIAE

Interest of Amicus */

For over 59 years, the American Civil
Liberties Union has been dedicated to
the protection and preservation of

*/ The parties have agreed to the filing
of this brief. Their letters of consent
have been lodged with the Clerk of the
Court pursuant to Rule 42(2).

the civil liberties of the American people through a vigorous defense of the safeguards embodied in the Constitution.

The present case is of particular interest to the ACLU because the issues presented concern the continued integrity of a fundamental constitutional provision, the Fourth Amendment right of the people to be free from unreasonable searches and seizures. The indiscriminate use of the "drug courier profile" poses a substantial threat to that right.

The hallmark of our criminal justice system is its concern with the culpability of the individual. Use by law enforcement officials of non-individualized "profile" characteristics to support investigatory stops for questioning, runs counter to this precept of individual culpability.

In Torres v. Puerto Rico, the ACLU urged the invalidity of a statute which authorized the random, indiscriminate searches of personal belongings of persons entering Puerto Rico from the United States. And in Delaware v. Prouse, the ACLU successfully argued the unconstitutionality of police

stops made neither for articulated reasons nor pursuant to specific guidelines and discretion-free standards.

The ACLU has repeatedly urged upon this Court a "strict construction" of the Fourth Amendment. The government seeks to remove from the protections of that Amendment the privacy of the hundreds of thousands of persons utilizing our nation's airports. It is the purpose of this amicus brief to demonstrate that the applicability of a "drug courier profile" cannot, without more, justify a sufficiently reasonable suspicion of criminal activity to authorize the discretionary stopping and questioning of an individual who meets that profile.

STATEMENT OF THE CASE

Amicus adopts and relies on the statement of the case set out in respondent's brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has repeatedly affirmed the constitutional principle that the Fourth Amendment protects individuals from being stopped and questioned, except with consent or upon a reasonable and articulable suspicion of criminal activity. Brown v. Texas, 61 L Ed 2d 357 (1979); Delaware v. Prouse, 59 L Ed 2d 660 (1979); Terry v. Ohio, 392 U.S. 1 (1967); Cf. Ybarra v. Illinois, 48 U.S.L.W. 4023 (November 28, 1979). In contrast to other, less free societies which do not value the right to be let alone, and where questioning by police officers with broad, standardless, discretion is commonplace, ^{1/} the Fourth Amendment permits such questioning only where it is objectively reasonable, after giving due regard to the individual's right of privacy. See generally Delaware v. Prouse, supra, at 667.

^{1/} Consider the South African police practice reported in the New York Times, January 23, 1966.

(footnote continued on next page)

Petitioner, the United States, disputes the applicability of the "reasonable suspicion" standard in the circumstances of this case, arguing that brief questioning of individuals suspected of being drug couriers does not implicate any interests protected by the Fourth Amendment, and thus, presumably, can be conducted on a wholly arbitrary basis. Perhaps in recognition of the weakness of

(footnote continued from previous page)

"Johannesburg, Jan. 22 - The police in Johannesburg have hit on an efficient, if crude, way to reverse an alarming rise in armed robberies in the city; to treat every black man as a criminal suspect."

This is done by saturating a prescribed area with policemen under orders to check the 'reference books' - the passports all blacks must carry in "white" areas - of every African they encounter... The undeniable success of the raids shows that it is not a fantastic notion for the white authorities to find a suspicion of criminality in a black skin - an indication of the extent to which this is a society at war with itself."

this argument which has been rejected in at least seventeen lower court decisions (see note 9, infra), petitioner contends, in the alternative, that the "reasonable suspicion" standard is met whenever an individual exhibits one or more of the characteristics of an unwritten, constantly changing, and unvalidated "drug courier profile". This "profile" is already in use in over 25 metropolitan airports (Gov't. Br. 2) and the government forthrightly admits that it intends to extend the use of similar profiles to other contexts (Pet. for Cert. 11 n.12).

The stopping and questioning of respondent was a "seizure" within the meaning of the Fourth Amendment. Accordingly, it was unlawful absent facts which created a reasonable suspicion that respondent was engaged in criminal activity. See, e.g., Delaware v. Prouse, supra; Terry v. Ohio, supra; Brown v. Texas, supra. Cf. Ybarra v. Illinois, supra. (Point I). Based on the essentially undisputed facts, it is clear that at the time she was stopped, the federal

officers did not have reasonable suspicion. The practice the government asks this Court to approve - the use of a "drug courier profile" to justify stopping and questioning individuals - is simply an attempt to circumvent the Fourth Amendment requirement of reasonable suspicion. (Point II).

Finally, the "primary illegality" of the initial stopping and questioning having been established, evidence seized during the associated strip search of respondent's person must be suppressed. The alleged consent relied on by the government was not voluntary within the meaning of Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

In any event, the primary illegality is so closely tied to that search in time and circumstance that the taint was not sufficiently attenuated to preclude suppression, even if there were consent. (Point III).

I. THE INVESTIGATORY STOPPING
AND QUESTIONING OF RESPONDENT
WAS A SEIZURE REQUIRING REA-
SONABLE SUSPICION UNDER THE
FOURTH AMENDMENT.

Resolution of this issue is controlled by this Court's recent and unanimous decision in Brown v. Texas, 61 L.Ed. 2d 357 (1979). There, the Court squarely held that when police officers stop and question an individual, even if only for the limited purpose of requiring him to identify himself, they perform a "seizure" subject to the requirements of the Fourth Amendment. Id. at 361. Here too, "officers detained [respondent] for the purpose of requiring [her] to identify [herself]", and accordingly, "they performed a seizure of [her] person subject to the requirements of the Fourth Amendment." Id.

Although simple stopping and questioning is not ordinarily sufficiently intrusive to require "probable cause", it sufficiently implicates interests protected by the Fourth Amendment to require at least a "reasonable suspicion" of criminal activity. Brown v. Texas, supra, at 362. Thus it is settled under Brown v. Texas that a "seizure" has occurred,

within the meaning of the Fourth Amendment, even if the individual has not been "arrested", and even if the only thing "seized" is identificatory information. Of course, a "seizure" does not occur everytime a police officer attempts to question an individual. Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968). But unless it would be clear to the individual from the circumstances that the individual is entirely free to ignore the officer and proceed on his way, stopping and questioning will constitute a "seizure" within the meaning of the Fourth Amendment. Brown v. Texas, supra; Sibron v. New York, 392 U.S. 40, 63 (1968); Terry v. Ohio, supra, at 19 n.16; Delaware v. Prouse, supra, at 667-8; United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

It will always be difficult for courts to weigh after the event all of the subtle nuances of attitude, tone of voice, facial gestures, etc., from which the individual must conclude whether he or she is free to

ignore an officer's questioning. ^{2/} But it is not unfair to resolve doubts on that issue against the officers, for they have it entirely within their power to dispel any apprehension of coercion or necessity to respond simply by stating, at the outset, that the individual is entirely free to ignore the questions, and will not be detained. That simple statement was not made in this case.

Furthermore, it is obvious that respondent did not feel free to ignore the questions. Why would respondent, who was in fact concealing contraband, answer questions about her identity and travel plans, and thereafter "consent" to a search of her person which she knew would reveal the contraband, if she felt entirely free to ignore those questions and to refuse that search? Regardless of whether as a matter of law she was re-

^{2/} Petitioner suggests, for example, that whether the event is or is not a "seizure" may depend on "use of tone of voice or language indicating a demand, rather than a request." Gov't. Br. 25 n.19.

quired to cooperate, she obviously believed she was required to cooperate, and in the circumstances of this case, that belief was not unreasonable. Respondent was only 22, and had not even graduated from high school (A. 13). She was stopped not just by one officer, but by two, which must have suggested to her that the government had more than a casual interest in obtaining answers to its questions. ^{3/} The officers identified themselves as "federal" agents. Whatever she knew or might have known of the authority of state agents, she might reasonably have believed that federal officers would have even greater authority to stop and question than would state officers. The officers were males, which to her, a black female, might well have seemed intimidating.

^{3/} The government appears to agree that the presence of "several" officers, at least if they were in uniform, would be more indicative of a "seizure" than the presence of one uniformed officer (Gov't. Br. 26).

We cannot know all the facts and factual nuances attending the event, but we do know, from their own admissions, that the officers intended all the while to restrain her if she attempted to walk away (A.19,21). That is an extremely significant admission, because that attitude was no doubt reflected in the officers' tone, language and gestures, all of which accurately communicated to respondent that she was not in fact free to leave.

After questioning respondent regarding her travels, and asking to see identification and her airline ticket, the officers took respondent to a locked, private DEA office for further questioning (A. 11-12).^{4/} The government argues that this move to the DEA office was not more intrusive or coercive than the initial questioning, because the office was only 50 feet away.

^{4/} Although petitioner argues that questioning in a private office is less embarrassing to individuals than questioning in a public place, that is surely an option to be claimed or not by the individual not a "governmental" interest justifying the private interrogation of an individual.

That argument ignores the reality that it is more coercive to be questioned in the private, locked office of a law enforcement agency than to be questioned in a public concourse. Questioning in a locked DEA office is the substantial equivalent of custodial interrogation in a police station. By taking respondent to the DEA office for further questioning about herself, the officers confirmed to her that she was the focus of an investigation of criminal activity.^{5/}

Clearly, the stopping and questioning involved in this case was far more extensive and intrusive than the stopping and questioning that was found to constitute a "seizure" in Brown, Sibron, and Prouse.

^{5/}The adversarial confrontation of the traditional Terry "stop" is to be distinguished from circumstances in which an officer seeks the cooperation of a non-suspect in the detection and prevention of crime. In sharp contrast to the suspects detained here and in Brown, cooperating non-suspects are not ordinarily required to produce identification, documents, and quick explanations of their activities. Such encounters do (footnote continued on next page)

In these circumstances, including the fact that respondent was not told she was free to leave, her actions cannot be considered- the "voluntary cooperation" referred to in Adams v. Williams, 407 U.S. 143, 146 n.1 (1972), or the benign conversation between police officer and the cooperating citizen referred to in Terry v. Ohio, supra, at 34 (White, J., concurring), where a person has a right to ignore his interrogator and walk

(footnote continued from previous page) not ordinarily assume an adversarial tone. Rather, cooperation is sought with respect to other parties and events. In those encounters, it may be clear that the person briefly stopped is not the focus of investigation, and he may, therefore, feel free to ignore the officer and walk away. By contrast, respondent, the focus of police investigation from the outset, was subjected to a classic adversarial Terry confrontation; "[a] brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information..." Terry v. Ohio, supra, at 21-22; Adams v. Williams, 407 U.S. 143, 145-6 (1972).

away.^{6/}

^{6/}The government in its brief submits that respondent voluntarily cooperated with their "request". (Gov't. Br. 26) But they ignore the critical distinction made by the very commentators they rely on, between seeking the cooperation of a non-suspect in the investigation or prevention of crime, and the stopping and questioning of suspects. The Model Code of Pre-Arraignment Procedure cited by the government at note 15 also makes this distinction explicitly. Section 110 entitles police to request cooperation from the citizenry at large, but requires the officer to make clear that no legal obligation exists to respond before questioning one he suspects of having committed a crime. See Model Code of Pre-Arraignment Procedure, §§110.1 (1), (2), at 3 (Proposed Official Draft) (1975). This provision formally recognized that suspects questioned in furtherance of a criminal investigation are overawed by official "requests". In this case, it is clear that respondent was a suspect and was approached as such. Thus, in the absence of a warning, it is reasonable to assume that a suspect unaware of her rights and overawed by an official request, views that request as a demand. Professor LaFave, also cited by the government (Gov't. Br. at 21 n.14, 24-5), would distinguish cooperation from a 'seizure' where a tone of voice or language indicating a demand rather than a request is used, or where an encounter would be viewed "as threatening and offensive even if coming from another private citizen". See generally 3 LaFave, Search and Seizure, A Treatise (footnote continued on next page)

Perhaps recognizing that the stopping and questioning at issue in this case must be deemed a "seizure" under existing law, the government argues that an additional factor - "significant menacing conduct" accompanying an "on-the-street" interrogation and identification check - should be

(footnote continued from previous page)
on the Fourth Amendment, §9.2 at 54 (1978). Certainly where two agents approach a suspect, require the production of several pieces of identification, and interrogate her, their request is more likely to be taken as a demand resulting in application of standards required in investigatory stops. The government's brief illustrates the difficulties inherent in making the question of whether a "seizure" took place turn on assumptions about the tone of voice used by the two federal agents. By inserting the word "politely" in their description of the way in which the agents "asked" for identification, they characterize the event as a non-seizure (Gov't. Br. at 26). Had the word "demandingly" or "impolitely" been inserted, presumably a seizure would be described. The better approach is to evaluate the situation keeping in mind the fact that even a skilled law professor can be "cowed" by an agent who "asks" for papers and explanations. See, e.g., Reich, "Police Questioning of Law Abiding Citizens", (footnote continued on next page)

required before an investigatory stop is termed a "seizure" (Gov't. Br. 24-5). But that factor was not present in Prouse, Brown, or Terry to any degree greater than in this case. The conduct of the officers in Brown, which constituted a "seizure", was less intrusive than the conduct here, which the government claims is not a seizure. ^{7/} The difference, the government

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75 Yale L.J.1161 (1966). Viewed from this perspective, the disparity of authority between two federal agents asking for papers and other identification and engaged in the "competitive" activity of uncovering crime, and a young black woman, compels the conclusion that she was seized, notwithstanding the adverbs placed around the word "asked" to characterize the encounter.

^{7/}Where Brown was asked simply to identify himself orally and explain why he was in an alley, Brown v. Texas, supra, at 360, respondent was approached by individuals who identified themselves as federal agents, and then demanded identification, an airline ticket, answers to several questions regarding her travels, and her presence in a private locked governmental office, some distance away, for further questioning. (A. 11-12).

suggests, is that Brown was "ipso facto seized" by a statute which made a refusal to give identification an offense (Gov't. Br. 24 n.18). But people are seized by police officers, not by statutes. Whether a "seizure" occurs turns on the nature of the intrusion, not on the existence or wording of a state law of which an individual may not even be aware.^{8/} The circumstances of the intrusion in Brown and the instant case are indistinguishable.

Applying this Court's teachings, an overwhelming number of reported lower court decisions involving investigatory stops of travelers for identification by DEA agents suspecting narcotics trafficking have expressly held that such stops are "seizures" and require "reasonable

^{8/}The existence of a state law authorizing a seizure may be relevant to whether an officer who executes that law will be immune from a suit for damages, but not to whether a seizure has or has not occurred.

suspicion".^{9/}

9/See United States v. Andrews, 600 F.2d 563,567 (6th Cir.1979); United States v. Smith, 574 F.2d 882 (6th Cir.1978); United States v. Canales, 572 F.2d 1182,1186 (6th Cir.1978); United States v. Pope, 561 F.2d 663,668(6th Cir.1977); United States v. McCaleb, 552 F.2d 717,720(6th Cir.1977); United States v. Vasquez-Santiago, 602 F.2d 1069,1071(2d Cir.1979); United States v. Roundtree, 596 F.2d 672,673-4(5th Cir.1979) United States v. Oates, 560 F.2d 45,59 (2d Cir.1977); United States v. Ballard, 573 F.2d 913,915 (5th Cir.1978); United States v. Rogers, 436 F.Supp. 1,7(E.D.Mich.1976); United States v. Floyd, 418 F.Supp. 724,728 (E.D.Mich.1976); United States v. Westerbann-Martinez, 435 F.Supp. 690,696 (E.D.N.Y.1977); United States v. McClain, 452 F.Supp. 195,197 (E.D.Mich.1977); United States v. Allen, 421 F.Supp. 1372,1373 (E.D.Mich.1976); United States v. Van Lewis, 409 F.Supp. 535,542 (E.D.Mich.1976); United States v. Chamblis, 425 F.Supp. 1330,1332 (E.D.Mich.1977); United States v. Rico, 594 F.2d 320,326 (2d Cir.1979). See also United States v. Price, 599 F.2d 494 (2d Cir.1979)(question reserved but concurrence finds reasonable suspicion for a stop existed under the facts). Contra United States v. Elmore, 595 F.2d 1036,1042 (5th Cir.1979).

Assuming that the stopping and questioning in this case did constitute a "seizure", the Fourth Amendment standard by which its legality must be measured is not in dispute. The government concedes, and amicus agrees, that the officers were required to have reasonable suspicion that respondent was engaged in criminal activity before "seizing" her (Gov't. Br. at 26-27). See generally Brown v. Texas, supra at 362; Delaware v. Prouse, supra at 672; Terry v. Ohio, supra at 21. More precisely, the officers were required "to have a reasonable suspicion based on objective facts that the individual is involved in criminal activity". Brown v. Texas, 67 L Ed 2d at 362. As we now demonstrate, that reasonable suspicion was lacking here.

C

II. THE SEIZURE OF RESPONDENT
WAS UNCONSTITUTIONAL BECAUSE
IT WAS NOT BASED ON A REASON-
ABLE SUSPICION THAT SHE WAS
INVOLVED IN CRIMINAL ACTIVITY.

The government bears the burden of demonstrating, by means of objectively evaluable facts, that in the few minutes the officers had to observe respondent's behavior, while she hurried to catch a connecting flight at Detroit Metropolitan Airport, she sufficiently distinguished herself that a person of reasonable caution would reasonably have suspected her to be engaged in criminal activity. Brown v. Texas, 61 L Ed 2d at 362. To meet this burden, the government claims that the behavior the officer observed did give rise to reasonable suspicion, and that the correlation between respondent's behavior and the unwritten "drug courier profile" used at that airport ^{10/} is a

^{10/}Each airport maintains "its own set of drug courier characteristics." There is "no national profile." Even the local profiles are "not rigid" but are "constantly modified." Gov't. Br. 31, n.23. Thus, individuals exhibiting precisely the same characteristics might be stopped at (footnote continued on next page)

"significant" consideration in determining whether the government has carried its burden of proof (Gov't. Br. 31). Because the facts compel the conclusion that the behavior which the agents observed, and on which they based their suspicion, is indistinguishable from that of hundreds of thousands of domestic air travelers, and does not constitute reasonable suspicion, the inclusion of those behaviors in an unwritten, ad hoc "profile" cannot create reasonable suspicion.

The government's argument is difficult to understand, and apparently self-defeating. The government appears to concede that matching one or more of the characteristics of the local drug courier profile will not constitute either "probable cause" or

(footnote continued from previous page)
the airport in Detroit, but not at the airport in Chicago. Similarly, identical characteristics might subject an individual to questions at the Detroit airport in May, but not in June.

"reasonable suspicion" of criminal activity.^{11/} There must be something more. The "more", in the government's view, is the "correlation" or "coincidence" between the characteristics observed by the officers, and the inclusion of those same characteristics in the local drug courier profile.^{12/} In the government's

^{11/}Gov't. Br. 31 ("[a]lthough we have never suggested that 'the drug courier profile, in itself,' automatically constitutes either a standard of probable cause or of reasonable suspicion - the reasonableness of a stop must always be measured by the totality of the facts - we do contend that a correlation of observed facts with the drug courier profile should not be disregarded, but is in fact a significant and legitimate consideration in determining the permissibility of a stop. The failure of the court of appeals to give due consideration to coincidence with the profile may stem from a misunderstanding of its nature and function").

^{12/}The government stressed that "[i]n addition, several of the facts observed by the agents coincided with 'the drug courier profile' "(Gov't. Br. 30).

view, a "high coincidence between observed facts and profile characteristics can be quite significant." (Gov't. Br. 32) Apparently, this coincidence is enough to establish reasonable suspicion even if the profile itself is not. That is a circular argument. If the profile does not constitute reasonable suspicion, as the government seems to acknowledge, the fact that respondent's behavior matched the profile cannot constitute reasonable suspicion. If the government had evidence of criminal activity other than behavior included in the profile, the fact that the individual also met the profile could at least arguably heighten the level of suspicion sufficiently to constitute reasonable suspicion.^{13/} For example, if

^{13/}Amicus would urge a different conclusion, but the point is at least arguable. In any event, the relevance of a profile in those circumstances is not presented by the facts of this case, and need not be decided to resolve the issue presently before this Court.

agents in Detroit received a telephone tip from a reliable informant in Los Angeles that an unnamed, young, white male in a camel overcoat would be arriving in Detroit on a particular flight and would be carrying drugs, and if ten persons meeting that description got off the plane, the fact that one of them was the last to leave the plane, carried no luggage, and met other characteristics of the profile, could at least arguably create a sufficiently reasonable suspicion of criminal activity, in connection with the tip, to justify stopping and questioning that individual.

But that is not what happened in this case. Here, every behavior relied upon by the officers to constitute reasonable suspicion was a behavior that was included in the drug courier profile. The profile was not "in addition" to other information; it was the only information. Thus, under the government's own analysis, the facts in this case should be deemed insufficient to constitute reasonable suspicion.

Assuming the government will change its position and will argue, as it has not to date, that matching a drug courier profile

"in itself" constitutes reasonable suspicion, amicus will show that such profiles do not, of themselves, constitute reasonable suspicion, and certainly cannot constitute reasonable suspicion where, as here, other information known to the agents negated any suspicious inferences that could otherwise be drawn.

The facts disclose that respondent's behavior was completely normal and similar to that of any other domestic traveler in the Detroit Metropolitan Airport. Compare Brown v. Texas, supra; Delaware v. Prouse, supra. Moreover, the record discloses that the agents deliberately ignored information uncovered through their surveillance which negated even their marginal grounds for suspicion.

When respondent stepped off her American Airlines flight at Detroit Metropolitan Airport, the agents had no prior information about her, and no information suggesting an imminent incident of drug trafficking (A. 49). Their attention was drawn to respondent solely because she arrived on a flight from Los Angeles, was last to exit the plane,

and was thought to appear nervous (A.9, 12, 14, 15). When she did not claim luggage immediately, but proceeded instead to obtain a boarding pass from Eastern Airlines for its next Pittsburgh flight, she was stopped by the agents (App. 38).

The government, in its brief in the Sixth Circuit, claimed that respondent's behavior was "activity not normal for law-abiding citizens." (Gov't. 6th Cir. Br. 16). However, to the layman and even to the "trained experienced police officer who is able to perceive and articulate meaning in conduct which would be wholly innocent to the untrained observer," Brown v. Texas, supra, at 362 n.2, this behavior bespeaks nothing but innocent conduct.

First, the government claims significance in the fact that respondent arrived in Detroit on a flight from Los Angeles. This was deemed suspicious because Los Angeles "is the primary source city for heroin coming into Detroit" (A. 9-15). However, even were it assumed, arguendo, that passengers deplaning from Los Angeles could reasonably be suspected of carrying

drugs into Detroit, upon observing respondent, the agents learned that she was making an immediate connecting flight to Pittsburgh (A. 10,11,17). Since she could not be suspected of bringing narcotics into Detroit if she was immediately going on to Pittsburgh, this extremely tenuous ground for suspicion disappeared. In any event, travel from Los Angeles can hardly be regarded as suspicious:

Los Angeles may be a major narcotics distribution center, but the probability that any given airplane passenger from that city is a drug courier is infinitesimally small. Such a flimsy factor should not be allowed to justify - or help justify - the stopping of travelers from the nation's second largest city. United States v. Andrews, 600 F.2d 563 (6th Cir. 1979).

An analogous argument was made by Puerto Rican authorities last term, who contended that persons arriving in Puerto Rico from the mainland were likely to be drug couriers. That argument was sharply rejected by this court. Torres v. Puerto Rico, 47 U.S.L.W. 4716, 4717, 4719 (June 18, 1979); Cf. Ybarra v. Illinois, supra, at 4025 (mere pre-

sence in bar subject to search warrant for narcotics not grounds for belief that individual is involved in drug traffic); Sibron v. New York, supra, at 62 (talking to narcotics addicts for eight hours not ground for inference that one is trafficking in narcotics); Brown v. Texas, supra, at 362-3 (being in a neighborhood frequented by drug users is not a basis for concluding that a person was engaged in criminal activity); United States v. Brignoni-Ponce, 422 U.S. at 885-6 (even though there is a substantial likelihood that a person of Mexican ancestry found near the border will be an illegal alien, Mexican appearance does not justify an investigative stop); Delaware v. Prouse, supra (driving a car not a basis for concluding that driver is violating any traffic safety regulations).

Furthermore, the government claims that its "source city" designation is an element of its "drug courier profile." (A. 9,10: Gov't. Br. 30) However, the Sixth Circuit, which, judging from the reported cases, has decided more cases concerning DEA investigative stops than any other circuit (see cases Point I n.9 supra), has indicated in a very recent

decision that this "source city" designation is manipulated by DEA agents to fit the city of origin of anyone it stops and searches. See United States v. Andrews, supra, at 566-7 ("our experience with DEA agents' testimony in other cases makes us wonder whether there exists any city in the country which a DEA agent will not characterize as either a major narcotics distribution center or a city through which drug couriers pass on their way to a major narcotics distribution center").

Other facts which suggested the innocence of respondent's behavior were overlooked. The agents attached significance to the fact that respondent claimed no luggage upon her departure from the airplane (A. 8,10). Yet they found out a few moments later that she was changing airlines to reach her final destination (A.10). Accordingly, the suspicious inference that she had no luggage was improper because presumably the luggage was being transferred for her, as the agent

testified at the suppression hearing (A.16,17).^{14/} The agents accorded significance to the fact that respondent changed airlines in Detroit, drawing the inference that she was evading law enforcement surveillance (A.11). However, despite the fact that the agents had been working at Detroit Airport for a long time (A.7), neither possessed sufficient

^{14/}Although the government asserts that respondent had been "booked on American Airlines from Los Angeles through Detroit to Pittsburgh", and that when she attempted to change her booking to an Eastern flight she made no inquiries about transfer of her luggage from American Airlines, those "facts" find no support in the record. (Gov't. Br. 29). As the Airline Guide makes clear, respondent could not have been "booked on" a connecting American Airlines morning flight from Los Angeles to Pittsburgh with a stop in Detroit, for there was no such flight; she could only have been "booked through" or "ticketed on" American Airlines, with actual Detroit-Pittsburgh passage on another airline. See n. 15, infra. Nor did any person testify that respondent failed to inquire "about...arrangements for the transfer of any luggage from the American or Eastern flight (A.11)". Gov't. Br. at 29. The record is silent on whether she made such inquiries.

information to distinguish a change of airlines which is an evasive tactic, from those innocent changes which are made by many thousands of travelers each day due to the exigencies of flight scheduling (A.17).^{15/}

The good faith of the agents in asserting that respondent's "transfer of airlines" was a profile ground for suspicion is also

^{15/A} simple check of the flight schedules for the day respondent was stopped would have shown the agents that her decision to fly to Pittsburgh via Detroit, where she was to connect with an Eastern Airlines flight, was the efficient (and thus non-suspicious) means of reaching Pittsburgh after an early morning Los Angeles departure. The "North American Official Airline Guide," (the "Guide"), issue of February 1, 1976, shows the earliest direct flight to Pittsburgh from Los Angeles to be a 10:00AM Eastern flight. See "Guide", supra, at 711-12. Respondent deplaned in Detroit at approximately 6:25AM (A.8), indicating that she left Los Angeles at an hour when direct flights to Pittsburgh were not available. The guide further indicates that American Airlines, the airline respondent flew to Detroit, had no connecting flight to Pittsburgh, see Guide, supra, at 709. It therefore, appears that respondent, who arrived in Detroit at 6:25AM and obtained a boarding pass for an Eastern Airlines shuttle to Pittsburgh, intended to take the 7:00AM Eastern flight, the earliest connecting (footnote continued on next page)

doubtful. This characteristic does not appear to have been relied on by the government in other "profile" cases. And it conflicts with testimony given by DEA agents in other cases that the profile includes taking direct flights from specified cities. See, e.g., United States v. Floyd, supra, 418 F.Supp. at 25. See also United States v. Chamblis, 425 F.Supp. at 1333 (agent candidly admits that "the profile in a particular case consists of anything that arouses his suspicions").

Trained officers have an obligation to consider information that would negate suspicion, even if lay persons would not even notice that information. Accordingly, trained officers should have less leeway than lay persons to read suspicion into behavior which, due to their job and special knowledge, they should recognize to be innocent:

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flight available. See Guide, supra, at 709. Since this change was required to reach Pittsburgh expeditiously, this change of airlines was entirely reasonable.

[C]ourts have long accepted the fact that the training and experience of police may equip them to reach conclusions different from those of a layman. This factor, of course, cuts two ways: An officer because of his training and experience may be held to have probable cause when a layman confronted with the same facts would not; or he may for this reason not be entitled to mistakes which would be reasonable for a layman, and thus not have probable cause.

(Emphasis added, footnotes omitted.) LaFave, "Street Encounters and the Constitution: Terry, Sibron, Peters, and Beyond," 67 Mich. L.Rev. 39, 70, 71 (1968).

The experienced diligent officer,^{16/} careful to respect constitutional limitations and avoid unjustifiable intrusions into the privacy of the traveling public, should take reasonable steps to acquaint himself with facts which might eliminate the suspicion relied on by the government for this investigatory stop.

^{16/}Agent Anderson had over ten years experience with DEA (A.7).

As another element of suspicion, the agents cited the fact that respondent was the last person to exit the aircraft. This is no unusual event; someone is last on each of the thousands of domestic flights each day. Compare Brown v. Texas, supra, at 362 ("[t]here is no indication in the record that it was unusual for people to be in the alley"). Being last may well be fortuitous, depending on seating arrangements, the position of doors, or the haste of forward passengers to depart. Many passengers believe the rear-most seats are the safest, or the quietest. In addition, the rationale for suspecting the "last-out" - that the person can observe the area to detect agents (A.9) - is weak. Any position in the latter part of the line would satisfy this purpose and would avoid the attention of being "last out." Oddly, no other case could be found in which the existence of this characteristic was asserted (much less applied) by DEA agents. See United States v. Westerbann-Martinez, 435 F.Supp. at 98 (catalogue of profile characteristics asserted in various cases). If this objective and readily observable characteristic were more than tenuous guesswork and were routinely applied,

it would be expected to have surfaced elsewhere in the extensive litigation over the DEA drug courier program.

In addition to these more objective characteristics, the agents also alleged that respondent's "nervousness" was cause for suspicion (A.14). That is an extraordinarily subjective determination and therefore subject to arbitrary application. But even if respondent was nervous, to the layman and the skilled observer alike, "nervousness" aptly describes common airport behavior. Even if nervousness in a context where there is no cause for nervousness may be unusual and may give rise to reasonable suspicion if supported by other indications of criminal conduct, when an individual is perceived to be nervous in a context which commonly induces nervousness in normal law-abiding persons, that individual is not unusual and his or her nervousness should not cause a person of reasonable caution to investigate further. See, e.g., Brown v. Texas, supra, 61 L.Ed. at 362 ("[t]here is no indication in the record that it is unusual for a person to be in the alley"). Nervousness is entirely

consistent with innocent behavior at airports where tight business itineraries may be dashed by missing a flight or by a flight scheduling change, or where a traveler may be anticipating a long-awaited rendezvous with friends or family. Many airline passengers are nervous simply because they are afraid of flying. See United States v. Andrews, 600 F.2d at 566; United States v. McCaleb, 552 F.2d at 720; United States v. McClain, 452 F.Supp. at 200 n.3. It is difficult to imagine a more common description of airline passenger behavior than nervousness.^{17/}

^{17/}The government appears to argue the nervousness factor in any way that supports a particular search. Compare United States v. Himmelwright, 551 F.2d 991, 992 (5th Cir. 1977) (government argues that it was suspicious that a woman was excessively calm while going through customs). See also United States v. Escamilla, 560 F.2d 1229, 1233 (5th Cir. 1977) (court noted that at times the government argues that it is suspicious for the occupants of a vehicle in the border zone to react nervously when a patrol car passes, while at other times the government argues that it is suspicious if the occupants just look at the road and do not acknowledge the patrol car).

To "nervousness" the agents add their final observation before seizing respondent: she scanned the passenger area when she departed the plane (A.9). "Looking around" the passenger area, even nervously, could not be grounds warranting an investigatory stop, or anyone who shows the slightest discomfort on deplaning, and then scans the passenger area for an expected relative or friend, would be subject to a Terry stop.

In short, separately and together, the factors the government relies upon for its claim that the investigatory stop of respondent was founded on reasonable suspicion point only to innocence. The knowledge that a young woman deplanes last from Los Angeles, glances around, appears nervous, and does not pick up her luggage on her way to obtain a boarding pass for an expeditious connecting flight on another airline to her destination in Pittsburgh, falls far short of the articulable and reasonable suspicion the Court has consistently required as a constitutional minimum for a Terry stop.

Like the defendant in Brown, respondent's activity was "no different from the activity of other pedestrians in th[e] neighborhood."

Brown v. Texas, supra, at 363. Her innocent-seeming behavior, buttressed by other observed facts which should have negated even a highly suspicious observer's inference that criminal activity was afoot, was far more innocent than that observed and found not to give rise to reasonable suspicion in Sibron v. New York, 392 U.S. at 62 (officer observed Sibron talking to known narcotics addicts over an eight-hour period), and Terry v. Ohio, supra.^{18/}

Reasonable suspicion would exist to stop almost any airline passenger if the facts in this case constitute reasonable suspicion. Indeed, the "drug courier profile" appears to be designed to accord

^{18/}"Two men hover about a street corner for an extended period of time...; where these men pace alternatively along an identical route, pausing to stare in the same store window roughly 24 times, where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away." Terry v. Ohio, supra, 392 U.S. at 23.

the agent very broad discretion to stop almost anyone.

The profile is not selective. It is a dragnet of characteristics. It does not consist of fixed characteristics, but rather, as one judge observed, "has a chameleon-like quality; it seems to change itself to fit the facts of each case." United States v. Westerbann-Martinez, 435 F.Supp. at 698. It is not written, ^{19/}

^{19/} The efficacy of the profile is seriously undermined by the fact that its criteria are reported in case law; since no effort has been made by the government to keep the profile "under wraps", couriers may now fabricate an acceptable profile. See United States v. Lopez, 328 F.Supp. 1077, 1086 (E.D.N.Y. 1971) (Weinstein, J.) (government request for in camera investigation of hijacker profile granted to avoid dissemination of its contents); United States v. Slocum, 464 F.2d 1180 (3d Cir.1972) (same); United States v. Bell, 464 F.2d 667,670 (2d Cir.1972) (same); United States v. Westerbann-Martinez, 435 F.Supp. at 699, ("[w]hen it becomes known that looking around will justify a conclusion of nervousness which in turn may justify an investigative stop, narcotics couriers will then deplane and proceed to their destination without looking around. At that point, the government will presumably argue that people who look straight ahead after deplaning are subject to investigative stops.")

nor is it the product of official guidelines (Gov't. Br. 4 n.4, 31 n.23). As one agent candidly admitted, "the profile in a particular case consists of anything that arouses his suspicions." United States v. Chamblis, 425 F.Supp. at 1333^{20/}

^{20/}This observation is borne out by the variety of "profile" factors purportedly relied on by agents in cases that have been litigated. Among these factors are: (1)being the last person to deplane: United States v. Mendenhall, No.6-8028 (E.D.Mich. Nov. 18, 1976); (2)short stays and direct flights to and from certain cities: United States v. Westerbann-Martinez, supra; United States v. Van Lewis, supra; (3)use of small or large bills to purchase tickets: United States v. Craemer, 555 F.2d 594 (6th Cir. 1977); United States v. Pope, supra; (4)use of light weight luggage: United States v. Chamblis, supra; (5)no one to pick up person at airport: United States v. Chamblis, supra; (6)glancing around terminal on exit from plane: United States v. Mendenhall, supra; United States v. Westerbann-Martinez, supra; (7)not having an FAA required name tag on luggage: United States v. Allen, supra; (8)not having a ticket folder: United States v. Allen, supra; (9)attempting to hide fact that people are traveling together: United States v. Floyd, supra; (10)hiding fact that someone is waiting: United States v. Floyd, supra; (11)person's appearance non-conducive to the manner in which they were (footnote continued on next page)

Moreover, the government has not kept records to show which "factors" have proven successful predictors, or which would permit validation and accurate

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flying: United States v. Westerbann-Martinez,
supra; (12) return to point of departure with
same clothes on as at time of departure:
United States v. Van Lewis, supra; United
States v. McCaleb, supra; (13) changing
planes or airlines: United States v.
Mendenhall, supra; (14) traveling under an
alias: United States v. Van Lewis, supra;
United States v. McCaleb, supra; (15) mak-
ing a phone call immediately after arriving
at the airport: United States v. Chamblis,
supra; (16) round trip ticket to drug dis-
tribution center: United States v. Craemer,
supra; (17) use of empty luggage: United;
States v. Craemer, supra, United States v.
Van Lewis, supra; and (18) exiting at upper
level where there is no public transporta-
tion: United States v. Chamblis, supra.

refinement of the profile in accordance with accepted statistical methods. There are no studies of the percentage of travelers the profile is likely to fit, or records of how frequently individuals have been interrupted by a stop for questioning and the production of documents, but have not been searched or arrested. And there are no records of the number of searches where no contraband was found.^{21/} In short, after

^{21/}The government offers only the most self-serving and misleading statistics imaginable, admitting that "accurate comprehensive statistics have not been kept" but claiming nonetheless that "records" indicate success because "controlled substances were found in 77 of the 96 encounters." (Gov't. Br. 32 n.24 quoting testimony recited in United States v. Van Lewis, 409 F.Supp. at 539.) The "96 encounters" include only those investigatory stops which were followed by either a consent search where contraband was found or a non-consensual search. Supplemental Appendix for Appellants at 1, United States v. Mendenhall, 596 F.2d 706 (1979). Thus, the government's records are deficient in four respects. First, there is no record of the number of investigatory stops which did not lead to searches. This data would indicate how accurate the profile is and the extent to which it licenses intrusions on law-abiding travelers. Second, there is no evidence that the recorded "en- (footnote continued on next page)

several years of experience, ^{22/}there is still no way to determine the validity of

(footnote continued from previous page) counters" resulted purely from application of the "profile". Many reported cases appear to turn on application of the profile but actually involved independent evidence such as tips, contacts from other police units, extensive outside surveillance or prior knowledge of the suspect as a drug trafficker. See, e.g., United States v. Canales, 572 F.2d 1182 (6th Cir. 1978); United States v. Oates, 560 F.2d 45 (2d Cir. 1977). Since the records do not indicate how many "successes" were solely the result of application of the profile, they do not tell us anything about the accuracy of the profile. Third, since the profile is not applied rigorously such that any traveler who fits the profile must be stopped, but rather is applied at the discretion of the agent, (see discussion Section II infra), the data does not tell us how many people the "profile" fits. In determining the accuracy of the "profile", it is important to know how often it applies, but this information is unavailable because the agent does not effect a "stop" when he or she decides, for any number of reasons, not to rely on the profile. Fourth, the records do not include the number of stops followed by consent searches where no contraband was found - a further indication that the records are self-serving rather than accurate.

^{22/}The DEA airport surveillance program has been in operation since 1974 (Gov't. Br. 2).

the "profile" because there is no evidence of its failures: only its successes have conveniently been recorded. 23/

There is another, even more important flaw in the profile - it is applied or not in the complete discretion of the officer in the field. The Court has repeatedly emphasized that the Fourth Amendment requires safeguards to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field." Camara v.

23/ Cf. United States v. Lopez, 328 F.Supp . 1082, 1084-86 (hijacker profile designed by Task Force involving several agencies and individuals skilled in psychology, law, engineering, and administration who made a detailed study of all then known hijackers and of the air traveling public, and all possible care taken to determine the statistical probability that an individual would satisfy the profile, and careful records kept to determine the number of persons who were stopped and subjected to a weapons search as a condition for boarding the plane, but who had no weapons); State v. Ochoa, 112 Ariz. 582, 544 P.2d 1097 (1976) (profile for the detection of stolen vehicles being transported to Mexico developed through detailed analysis of 10,000 vehicle thefts in the Phoenix area in a 17 month period).

Municipal Court, 387 U.S.523,532 (1967); Marshall v. Barlow's, Inc., 436 U.S.307, 320-2(1968); United States v. United States District Court, 407 U.S. 297,322-3 (1972); Delaware v. Prouse, supra, 59 L.Ed. 2d at 668-69; United States v. Brignoni-Ponce, 422 U.S. at 882; Brown v. Texas, supra, at 362; United States v. Martinez-Fuerte, 428 U.S.543,554 (1976). In applying this profile, agents pick and choose among the many it describes and determine who will or will not be "seized". See Pet. for Cert. 17-18 n.17. ("The basic purpose of the profile is to inform, but not to serve as a substitute for the agent's judgement in particular circumstances"). The introduction of uncontrolled, arbitrary, and standardless discretion transforms the assertedly discretion-reducing profile into a screen for the arbitrary exercise of governmental power. ^{24/} A particular DEA agent may stop

24/Cf. United States v. Lopez, supra, at 1101 ("the procedure instituted to detect hijackers...survives constitutional scrutiny only by its careful adherence to absolute objectivity and neutrality)(discretionary introduction of ethnic and other criteria by personnel rendered the system constitu- (footnote continued on next page)

only the blacks and hispanics who meet the profile. Only women may be stopped by another agent, and a third may stop only the shabbily attired, and let the well-to-do go by. Discrimination made possible by the "chameleon-like" nature of the drug courier profile and the discretionary manner in which it is applied, is precisely what the Fourth Amendment was designed to prevent. ^{25/} Even in circum-

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tionally impermissible and required suppression). See also Tribe, "Trial by Mathematics: Precision and Ritual in the Legal Process," 84 Harv. L.R. 1329, 1331 (1971) (pointing out that even a sound, statistically validated system can be abused by ignorant, careless or malevolent personnel).

25/Compare Papachristou v. City of Jacksonville,
405 U.S. 156, 170 (1972) ("Where...there are no standards governing the exercise of the discretion granted by the ordinance the scheme permits and encourages an arbitrary and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure").

stances not applicable here, where investigatory stops may be permitted on less than reasonable suspicion, the neutral and discretion-free application of objective criteria is required. See Delaware v. Prouse, supra, at 674 (Blackmun and Powell, JJ., concurring); United States v. Martinez-Fuerte, supra, at 559 (fixed border checkpoint minimizes discretion by field officer.) 26/

26/ Courts and commentators have questioned permitting any use of mathematical methods of "profiling" and "validation". See, e.g., Tribe, "Trial by Mathematics: Precision and Process", 84 Harv.L.Rev. 1329, 1333-4 (1971). Where public danger is great, as in the case of air piracy, there is arguably a greater need for application of these methods due to the threat to human life, the orderly operation of air commerce, and the stability of international relations. Given the public interest at stake and the absence of alternative means of stopping air piracy, reasonableness within the meaning of the Fourth Amendment might permit less factual justification and some reliance on statistical methods, although amicus would argue otherwise. See Amsterdam, "Perspectives on the Fourth Amendment", 58 Minn. L.R. 349, 390-2 (1974). Cf. United States v. Brignoni-Ponce, supra, at 878 (the reasonableness of a seizure (footnote continued on next page)

Finally, no significance can be attached to the profile because it is the agent who determines its content. See Pet. for Cert. 17-18 n.17("profile is not rigid, but is constantly modified in light of experience," and applied according to "the agents' judgement"). Thus, there is an identity in each case between the profile characteristics and the agent's observations; the profile is merely redundant of what has aroused the agent's suspicion. By admitting that no fixed objective standard exists, the government asks the court to accord significance to a profile which consists of nothing more than the subjective determinations of the agent.

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that does not require probable cause "depends on a balance between the public interest and the individual's right to person security"). But drug trafficking does not present a threat of similar magnitude or immediacy. Therefore, there is no justification for the use of a profile, much less an unvalidated profile, as grounds for the investigatory stop in this case.

Ruling that the use of this profile, without more, will not constitute reasonable suspicion, will not prevent DEA agents from enforcing the law. In United States v. Canales, 572 F.2d 1182 (6th Cir. 1978) and United States v. Oates, 560 F.2d 45 (2d Cir. 1977), careful investigations led to investigatory stops which were upheld by the Sixth and Second Circuits, respectively. 27/

27/In Oates, the DEA agent had personal knowledge that defendant was a major narcotics dealer. He boarded the plane with the defendant and noted that defendant and his traveling companion took seats in different sections of the plane. Id. 50. The companions rejoined on arrival in New York and were joined by a third man known by the agent to be associated with the drug culture in New York City. Although the flight had arrived at 10:00PM, the travelers were observed waiting for a return flight to Detroit at 7:00AM the following morning, and one of them had noticeable bulges under his clothing which had not been present on the arriving trip. Id. 51. Only at the conclusion of this competent police work were defendants stopped for questioning.
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That the questioning and subsequent search in this case did reveal narcotics does not justify the officers' actions. See United States v. Watson, 423 U.S. 411, 455-56 n.22 (1976) (Marshall, J., dissenting) (hindsight should not color the reasonableness of a search or seizure), quoted in United States v. Martinez-Fuerte, 428 U.S. 543, 565 (1976). The validity of the stop must be assessed by examining whether the facts then available to the agents amounted to "reasonable suspicion" sufficient to justify the forced stop for questioning. Based on the record, it is plain that no reasonable suspicion existed.

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In Canales, defendant was already suspected of narcotics trafficking by state police and DEA agents in both Detroit and Texas. He was tracked by Texas DEA agents to a bar in Mexico known for narcotics trafficking, and Detroit agents were put on alert when he boarded a return flight from Texas. Id. 1184.

III. RESPONDENT'S ALLEGED CONSENT TO A STRIP SEARCH WAS NOT VOLUNTARY, AND WAS INVALID AS A "FRUIT" OF AN ILLEGAL DETENTION. ACCORDINGLY, EVIDENCE OBTAINED IN A SEARCH IMMEDIATELY FOLLOWING UPON HER ILLEGAL INVESTIGATORY STOP MUST BE SUPPRESSED.

Assuming, as we have just demonstrated, that the investigatory stop of respondent was illegal, then - absent consent - a search incident to that arrest also violated the Fourth Amendment, and evidence seized in such a search would be subject to exclusion at trial. See, e.g., Sibron v. New York, 392 U.S. 40 (1968); Brown v. Illinois, 422 U.S. 590 (1975); Dunaway v. New York, 60 L Ed 2d 824 (1979).

The government argues that respondent validly consented to the search, and that such consent sufficiently purged the taint of illegality. However, consent was not freely given under the standards of Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Moreover, it was obtained by improperly exploiting an illegal detention. See Brown v. Illinois, supra.

1. There was no voluntary consent to search. The Court has frequently held that the normal sense of obligation to defer to

authority negates a finding of "voluntary" consent to a search. See, e.g., Johnson v. United States, 333 U.S. 10, 13 (1948) (consent following agent's approach to house and statement of authority to search not voluntary); Amos v. United States, 255 U.S. 313, 317 (1921) (consent following agent's approach and statement of intention to search not voluntary). The facts in this case show that respondent's consent was not voluntary.^{28/}

^{28/} The agents' single-minded determination to overbear respondent and gain her consent is demonstrated by their disregard of factors which, according to their later testimony, should have led them not to stop respondent in the first place. All that the agents knew of respondent when they fixed their attention on her was that she was young, black, a woman, and was last to leave a plane from Los Angeles (A.9). Although agent Anderson claimed respondent's failure to claim luggage was a factor in leading him reasonably to suspect her of criminal activity, he did not let the knowledge that she was making a connecting flight and, therefore, would not be claiming luggage, mute his eagerness to have his suspicion aroused. He was suspicious because she arrived from Los Angeles, a major "source" of narcotics coming into Detroit, but he did not let the knowledge that she was continuing on to Pittsburgh and would not stop in Detroit assuage his suspicion. He suspected her of an effort
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The prosecution carries the burden of showing that consent to a search is voluntary, and that burden cannot be carried by showing no more than acquiescence to a claim of authority. Bumper v. North Carolina, 391 U.S. 543, 548, 549 (1968); Johnson v. United States, supra, at 13. To determine whether consent is an act of submission or of self-will, the Court looks at the totality of circumstances "to assess the psychological impact on the

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to evade law enforcement officers because she was transferring airlines. Yet extensive experience in the Detroit Airport had not led him to acquire an "Airline Guide" which easily revealed both the absence of a connecting flight to Pittsburgh on the airline on which she traveled to Detroit, and that the transfer she was making was an expeditious (and, therefore, nonsuspicious) connection due to the absence of direct flights to Pittsburgh from Los Angeles at that hour. See supra Point II. Nor was his skepticism mitigated when she produced accurate identification upon request (A.18), because he intended to continue to detain her regardless of the identification she produced (A.19). Nevertheless, even though the agents' marginal grounds for suspicion were mitigated at each point by evidence betokening not crime but innocence, they relentlessly pursued their adversarial confrontation with respondent to gain what she eventually gave them under duress--a search of her person.

accused, and evaluate the legal significance of how the accused reacted." Schneckloth v. Bustamonte, supra, at 226.

Here, two agents interrupted the scheduled movement of a young black traveler, ignored the identification she produced at their demand, paid no attention to her explanation of her travels, disregarded for no apparent reason wholly innocent explanations for the few acts they saw as somehow "suspicious," and without explanation removed her to a locked, private, law-enforcement office (A. 12, 19). This entire course of conduct was directed at communicating to her what was concededly their intention--to get the evidence they wanted no matter what she did. By approaching her, identifying her, questioning her, and removing her, the agents indicated that they intended to secure evidence from her.

Even though respondent repeatedly requested her freedom, by stating that she had a plane to catch, thereby manifesting her desire to terminate her detention (A. 24, 27), they continued to detain her. In short, they proceeded so that when it came time to obtain their goal of searching her, she would acquiesce because she thought she had no choice. Their action was tantamount to implying the authority of a warrant to search her.^{29/} Cf. Bumper v. North Carolina, supra (consent procured by representation of possession of a valid warrant is involuntary).

^{29/} The extent to which respondent was manipulated into consenting to a strip search can be understood by imagining the rage one would feel were a policeman to approach and ask for consent to strip search. Consent would be even less likely to be forthcoming from one who had contraband concealed on her person. This is not to say that concealment of contraband renders consent to a strip search impossible, but such consent is improbable, and the government bears a correspondingly greater burden in demonstrating that the improbable has occurred.

Respondent was not asked for consent "on-the-street" where she could still have entertained the thought of walking away. In such public places, reprisal for refusing consent is less likely because the public may well observe and report on any such retaliation. See, e.g., United States v. Watson, 423 U.S. 411, 424 (1976) (public place); Schneckloth v. Bustamonte, supra (same). Respondent was isolated, removed from the passing public, and placed behind a locked door at the culmination of a series of unlawful invasions of her privacy and autonomy. Nor was respondent at liberty when she consented. Because the "inherent compulsion in custodial surroundings" works on free will, see

Miranda v. Arizona, 384 U.S. 436, 450 (1966), it is not reasonable to infer that consent is a product of free will when one's freedom is restrained by governmental officials. Cf. Wong Sun v. United States, 371 U.S. 471 (1963) (unreasonable to infer that incriminating statement was sufficiently the product of free will after unlawful seizure); Schneckloth v. Bustamonte, supra (implying that consent will be harder for state to demonstrate if individual is in custody).

Given the predictable effect of the agents' unrelenting unlawful action, respondent's consent under these circumstances to a humiliating strip search cannot be considered voluntary.

2. The Court of Appeals rested its decision primarily on the ground that there was no "valid consent to search," United States v. Mendenhall, 596, F.2d at 706.^{30/} Amicus

^{30/} The government's claim that the Court of Appeals disregarded the "totality of all the circumstances" rule of Schneckloth, relying instead on a per se rule, is wholly unjustified. The Mendenhall Court followed its analysis in McCaleb, a case carefully applying the Schneckloth rule and examining (footnote continued on next page)

has demonstrated that that ground is correct: consent was not freely given, and accordingly the judgement below must be upheld. As the government concedes, however, even if respondent voluntarily "consented" to the strip search, the fruits of the search would still be subject to exclusion if the search was so closely connected to the "primary illegality" of the detention that it is a "fruit" of a "poison tree" under Brown v. Illinois, supra.

Based on the factors canvassed in Brown and succeeding cases, it is clear that the taint from the illegal detention was not sufficiently attenuated to justify admitting the evidence seized pursuant to the search.

Here there were no intervening circumstances, aside from a warning of the right to refuse consent, which could have dissipated the effect of the illegal stopping and questioning. The agents admitted that they would have detained respondent if she

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the totality of the circumstances in assessing voluntariness. See United States v. Mendenhall, supra, at 707, citing United States v. McCaleb, 552 F.2d 717, 721 (1977).

had attempted to leave, and they engaged in a swift and escalating course of conduct designed to uncover the evidence they sought. Compare Brown v. Illinois, 422 U.S. at 605 ("[t]he detectives embarked upon this expedition for evidence in the hope that something might turn up"); Dunaway v. New York, 60 L Ed 2d at 838 (same). To hold the investigatory stop unconstitutional, but to admit the evidence thereby secured, would render the ruling that the stop was illegal a "mere form of words." Officers could effect illegal investigatory stops with impunity, encouraged by the knowledge that if able to procure "consent" to a search, evidence derived therefrom would be admissible at trial. Cf. Brown v. Illinois, supra, at 602, 603 (constitutional guarantee would be reduced to "a form of words" if intervening Miranda warnings were viewed as a "cure-all"); Dunaway v. New York, supra, at 840 (same).

If mere warning of the right to refuse consent to a search were held to attenuate the taint of an unconstitutional seizure, "the effect of the exclusionary rule would be substantially diluted." Brown v. Illinois, supra, at 602. The evidence here should therefore be excluded.

CONCLUSION

The judgement of the Court of Appeals
for the Sixth Circuit should be affirmed.

Respectfully submitted,

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